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No. 71-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

PEARCE JOHNSON, ET AL,

Petitioners,

v.

ROGERS C. B. MORTON, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Pearce Johnson, Don Kennard, Ben Atwell and Peyton Walters ("Petitioners") jointly petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on February 3, 1972.

OPINIONS BELOW

The opinion of the United States Court of Appeals (Appendix A) is not yet reported. The order of the Court of Appeals denying Petitioners' Petition for Rehearing and Petition for Rehearing En Banc (Appendix B) is not yet reported. The Judgment of the Court of Appeals issued as a mandate (Appendix C) is not yet reported. The Memorandum Opinion and Order Granting Injunctive Relief of

the United States District Court of the Western District of Texas (Appendix D) is not reported.

JURISDICTION

The opinion of the Court of Appeals was rendered on February 3, 1972 (Appendix A). Petitioners timely filed their Petition for Rehearing and Petition for Rehearing En Banc which was denied on March 13, 1972 (Appendix B), and this Petition is filed within ninety (90) days of that date. The Judgment of the Court of Appeals was issued as a mandate on March 21, 1972 (Appendix C). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Petitioners, or any of them, have standing to maintain this action as "aggrieved persons" under the Administrative Procedure Act (5 U.S.C. § § 701—706) to review the decision of the Secretary of Interior approving the use of federal funds under the Land and Water Conservation Fund Act of 1965 (16 U.S.C. § § 460*l*-4 through 460*l*-11) for the acquisition of a state park on Mustang Island.

STATUTES INVOLVED

The Land and Water Conservation Fund Act of 1965 (16 U.S.C. § § 460*l*-4 through 460*l*-11) is involved and is reproduced in Appendix E. The Administrative Procedure Act (5 U.S.C. § § 701-706) is also involved and is reproduced in Appendix F.

STATEMENT

The jurisdiction of the District Court below was invoked because a substantial federal question cognizable under 28 U.S.C. § 1331 was present, namely whether the Secretary of Interior exceeded his statutory authority under the

Land and Water Conservation Fund Act of 1965 (the "Act") by approving the use of $2,181,125.00 in federal funds to acquire land on Mustang Island for a state park because the proposed acquisition was not in accordance with the State Comprehensive Outdoor Recreation Plan as required by the Act. The amount involved in this controversy is in excess of the statutory requirement.

The Department of Interior ("Interior"), acting through the Bureau of Outdoor Recreation ("BOR"), administers federal matching grants under the Act. BOR has published and distributed a Grants-in-Aid Manual ("Manual") covering the administration of this federal program.

The Texas Parks and Wildlife Department ("Parks Department") is under the administration of the Parks and Wildlife Commission ("Commission"). At all times material to this lawsuit, the Commission consisted of Respondent Jersig, Respondent Gilvin, and Petitioner Johnson. Johnson served as Chairman of the Commission and as State Liaison Officer ("SLO"). The duties and responsibilities of the SLO are set forth by BOR in its Manual. Prior to the Mustang Island application involved in this suit, all applications submitted by Texas for matching federal funds under the Act have been approved and signed by the SLO pursuant to the provisions of the Manual.

Both the Act and the Manual require a state to develop and maintain a State Comprehensive Outdoor Recreation Plan ("SCORP") as a prerequisite to obtaining federal funds under the Act. Texas has a SCORP consisting of six volumes, which was prepared with federal financial assistance by the Parks Department. It has been approved by BOR, as required by the Act. The Act provides that the Secretary may grant federal funds for proposed park acquisitions if the proposed acquisitions are in accordance with SCORP (16 U.S.C. § 460*l*-8e).

During the summer of 1970, Respondent Wilson entered into negotiations with the Parks Department to sell to the State of Texas approximately 3,965 acres of land owned by her and others on Mustang Island for use as a state park. Mustang Island is a barrier island on the Texas Gulf Coast, located approximately six miles east of the city of Corpus Christi and approximately the same distance north of Padre Island National Seashore. The proposed Mustang Island acquisition was discussed at an executive session of the Commission on November 10, 1970. A proposed acquisition of a park site on Lake Livingston, Polk County, Texas, was also discussed at this executive session. Reports of this session show that the Parks Department was short approximately $1,000,000.00 in BOR funds if both of the proposed acquisitions were consummated.

On or about November 16, 1970, a project application requesting federal funds under the Act for the acquisition of the Mustang Island park site was prepared under the supervision of Respondent Singleton, then Executive Director of the Parks Department. It was delivered to Johnson for his approval as SLO, but Johnson refused to sign and submit the application because the proposed purchase of Mustang Island was not in accordance with SCORP. The project application form and the Manual require a certification that the proposed acquisition is in accordance with SCORP. This project application was never submitted to BOR.

Shortly thereafter, a second project application for the proposed Mustang Island acquisition was prepared by Respondent Singleton, was signed by Respondents Jersig and Gilvin, and was hand delivered on December 4, 1970, to the Assistant Director of the Midwestern Regional Office of BOR in Fort Worth, Texas. *This was the largest single application for federal funds under the Act ever received*

by BOR from Texas. No appraisal, survey, or clearinghouse comments were sent with the application, even though they were required by the Manual.

An advance copy of the project application was sent to Washington by the Regional Office of BOR on December 7. On December 9, the Regional Office forwarded the application materials to Washington with its recommendation that the project application be approved.

On December 10, Johnson wrote BOR requesting that the project application be withdrawn on the ground, *inter alia,* that the proposed acquisition of Mustang Island was not in accordance with SCORP. The Manual provides that an application may be withdrawn by the SLO at any time prior to approval of the application. The application was not returned; instead, it was approved by BOR on December 16, 1970. At that time, BOR still had not received an appraisal, a survey or the clearinghouse comments required by the Manual

This action was filed on December 29, 1970, and a temporary restraining order was granted by the District Court restraining the Respondents from consummating the proposed transaction. Two days later, the Honorable Joe Ingraham of the United States Court of Appeals for the Fifth Circuit granted Respondents a stay of this temporary restraining order. The stay order expressly stated that it would not affect the jurisdiction of the District Court to proceed with the merits of the case. The federal funds were then transmitted to Texas, but the proposed acquisition was not consummated because Respondents James and Calvert, State Treasurer and State Comptroller, respectively, refused to disburse the funds in light of the lawsuit.

Petitioners filed their First Amended Complaint, which

is reproduced in Appendix G[1]. No challenge was made to Petitioners' standing to bring and maintain this action until the morning the hearing commenced on the preliminary injunction. When such motions were filed by some of the Respondents, the District Court ruled that the question of standing would be carried with the case until the presentation of evidence was concluded. Various other motions were filed by Respondents, which motions were also carried with the case.

After a full evidentiary presentation by both sides, the District Court entered its Memorandum Opinion and Order Granting Injunctive Relief (Appendix D) on February 12, 1971. The District Court found that the proposed acquisition of Mustang Island was not in accordance with SCORP, and it further found that BOR had violated its own procedural regulations relating to appraisals, surveys and clearinghouse comments. The Secretary's approval of the application was therefore held to be an abuse of discretion and in excess of the statutory authority conferred upon him by the Act. Since the District Court consolidated the hearings on the preliminary and permanent injunctions, pursuant to Rule 65(a) (2), Federal Rules of Civil Procedure, the Respondents were permanently enjoined from consummating the proposed acquisition.

The District Court, after carefully reviewing both the pleadings (Appendix G) and the evidence introduced at the hearing *without objection*, found that each of the Petitioners had standing to bring and maintain this action. Since on appeal to the United States Court of Appeals for the Fifth Circuit the case was reversed and rendered on the ground that none of the Petitioners had standing to

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[1] The numerous exhibits to Petitioners' First Amended Complaint have been omitted from Appendix G because they are quite bulky and some of them are not reproducible in printed form.

bring this action, a brief recitation of the allegations and evidence relied upon by the District Court is appropriate.

The Petitioners alleged that the proposed acquisition of Mustang Island is a serious departure from SCORP, which will jeopardize the orderly acquisition and development of state parks in other areas of the state for several years by depleting funds available for these purposes. All of the Petitioners reside outside the Corpus Christi area in regions which would be deprived of state parks to which they are entitled under SCORP. Each of the Petitioners testified, without objection, that he has used existing state park facilities with some degree of regularity, and that he has a keen personal interest in the acquisition of state parks in localities other than the Corpus Christi area. This was especially true in the case of Petitioner Walters, County Judge of Polk County, Texas, who testified that he has been deeply involved in the proposed parkland acquisition on Lake Livingston in Polk County, which would allegedly be foreclosed by lack of state and federal funds if the Mustang Island acquisition is consummated.

The District Court further noted that Petitioners Johnson, Kennard and Atwell also have standing in an official posture to maintain this action. Johnson, as the appointed Chairman of the Commission, is the executive head of the Parks Department, responsible under state law for the administration of outdoor recreational resources. Johnson is also the appointed State Liaison Officer in accordance with the requirements of the BOR Manual. Petitioner Atwell is a State Representative serving on the House Revenue and Taxation Committee and the Legislative Budget Board of the Texas Legislature, both of which bear responsibility in the allocation of state funds for outdoor recreation. Petitioner Kennard is a State Senator serving on the Senate Parks and Wildlife and Finance Committees.

The District Court concluded that "each of these plaintiffs therefore occupies a position of public trust and responsibility in respect to the state's outdoor recreation policy, and should be accorded standing to litigate questions affecting that policy". (Appendix D, page D-9) The District Court further ruled that this was especially true in the case of Petitioner Johnson, who is confronted with an admixture of national and state policies in the performance of his duties. (Appendix D, page D-10)

REASONS FOR GRANTING THE WRIT

There are three compelling reasons why this Court should grant a Writ of Certiorari herein:

1. The judgment and opinion of the United States Court of Appeals for the Fifth Circuit conflicts with decisions of other courts of appeal in *Leuthold* v. *Camp*, 405 F.2d 499 (9th Cir. 1969), *affirming* 273 F.Supp. 695 (D. Mont. 1967); and *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967). Both of these cases afforded standing to a state official whose duties involve an admixture or interrelationship of state and federal policies. This ground clearly exists here, especially in regard to Petitioner Johnson who as Chairman of the Texas Parks and Wildlife Commission and as State Liaison Officer under BOR regulations is charged with the primary responsibility of administering state and federal law and policies relating to the acquisition of state parks in Texas.

2. The judgment and opinion of the United States Court of Appeals for the Fifth Circuit conflicts with decisions of this Court in *Sierra Club* v. *Morton*, ... U.S. ..., ... L. Ed.2d ..., ... S. Ct. ..... (1972) [No. 70-34, decided April 19, 1972, 40 Law Week 4397]; *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 27 L. Ed.2d 179, 91 S. Ct. 158 (1970); *Barlow* v. *Collins*, 397 U.S. 159, 25 L. Ed. 2d 192, 90 S. Ct. 832 (1970); and *Data Processing Services* v. *Camp*, 397 U.S.

150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970). This Court has established the test that plaintiffs have standing if they have suffered injury in fact to an interest which is within the zone of interests protected by the statute involved. The Court of Appeals below correctly stated the test in the abstract, but it completely misapplied that test to the facts of this case. Petitioners are users of state parks who reside in areas which allegedly would be deprived of needed parks by the depletion of funds in the acquisition of Mustang Island. The Secretary's approval of the Mustang Island application adversely affects Petitioners' use of existing and proposed state park facilities, and they are, therefore, aggrieved by the Secretary's unlawful action. Although this is true of all the Petitioners, this injury is most obvious in the case of Petitioner Walters. He resides in Polk County, Texas, near Lake Livingston. The Texas Parks and Wildlife Commission has considered acquiring land on Lake Livingston for a state park. The depletion of funds by the proposed acquisition of Mustang Island has caused the Commission to abandon its efforts to obtain a park site on Lake Livingston. This adversely affects Petitioner Walters' recreational interests as a user of existing park facilities on Lake Livingston which are already overcrowded.

The proposed acquisition of Mustang Island is a substantial deviation from the orderly plan for locating state parks embodied in the SCORP required by the Land and Water Conservation Fund Act of 1965 (16 U.S.C. §§ 460*l*-4 through 460*l*-11). The purpose of that Act, as expressed in 16 U.S.C. § 460*l*-4, is "to assist in preserving, developing, and assuring accessibility to all citizens of the United States of America of present and future generations . . . such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation . . ." Cer-

tainly Petitioners have shown an injury within the zone of interests protected by the statute.

3. There are no other reported decisions construing the Land and Water Conservation Fund Act of 1965 (16 U.S.C. §§ 460*l*-4 through 460*l*-11), and the issue of standing under the Act should be decided by this Court because of the importance of the Act in the orderly acquisition and development of state parks. It should be noted that this case does *not* involve the question of standing to challenge competing lawful uses of federal funds. It involves an unlawful use of federal funds which deprives persons of parks to which they are entitled under the law.

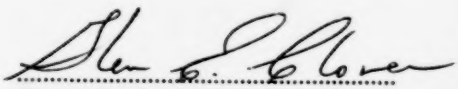
This Court has dealt with the question of standing in regard to projects which by their very nature are detrimental to the environment of those who live near the proposed project or who use the facilities which will be adversely affected by the project. However, this Court has not yet had an opportunity to write on the standing issue in a context where, as here, the proposed project is by its nature beneficial to the environment and recreational interests of those geographically located near the site of the project but it is detrimental to the environment and recreational resources of others who reside and use recreational facilities located at some distance from the project. In effect, the Court of Appeals has ruled that no one can have standing to review the Secretary's decision approving the use of federal funds to acquire Mustang Island: those residing near Mustang Island are unable to show injury because the project is beneficial to them; those residing at a distance from Corpus Christi are unable to show injury merely because they do reside at a distance from the proposed park site. Surely someone must have standing as aggrieved persons under Section 10(a) of the Administrative Procedure Act (5 U.S.C. § 702). Otherwise the Secre-

tary has unlimited authority under the Act, contrary to the intent of Congress. This case offers the Court an excellent opportunity to deal with the standing issue in a context which has widespread importance to the future of this country's recreational resources.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



GLEN E. CLOVER
Counsel for Petitioners

June, 1972

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been served upon Respondents by mailing same on June 8., 1972, to their attorneys of record as provided by Rule 33(1) and (2)(a), Supreme Court Rules, at the following addresses:

1. Solicitor General
   Department of Justice
   Washington, D.C. 20530

2. H. Lee Godfrey and J. Chrys Dougherty
   Graves, Dougherty, Gee, Hearon, Moody & Garwood
   204 Austin National Bank Building
   Austin, Texas 78701

3. Crawford C. Martin, Attorney General, and Nola White, First Assistant Attorney General
   Post Office Box 12548
   Capitol Station
   Austin, Texas 78711

4. Bob Eckhardt
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   Washington, D.C. 20515

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1375

PEARCE JOHNSON, ET AL,

Plaintiffs-Appellees,

v.

ROGERS C. B. MORTON,
UNITED STATES SECRETARY OF THE INTERIOR, ET AL,

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

(February 3, 1972)

Before BELL, AINSWORTH, and GODBOLD,
Circuit Judges.

BELL, Circuit Judge: This is an appeal from an order setting aside approval of the expenditure of federal funds under the Land and Water Conservation Fund Act, 16 USCA §§ 460*l*-1 et seq. and particularly § 460*l*-8, for the purpose of acquiring and developing lands on Mustang Island, Texas as an outdoor recreational park. The order appealed from also enjoined the appropriate state and federal officials from taking any further action toward the purchase of the Mustang Island property pursuant to the

application for federal funds which is the subject of this litigation.

One of several issues raised on this appeal is whether the district court erred in failing to dismiss this action for lack of standing. The suit below was brought as a class action by Pearce Johnson, Ben Atwell, Don Kennard, and Peyton Walters in their individual and official capacities and as representatives of all Texas citizens for orderly development of Texas park and recreational facilities. Appellee Johnson sued in four capacities: As a member of the class described above, as a concerned individual, as the Chairman of the Texas Parks and Wildlife Commission, and as the duly appointed State Liaison Officer. The other three plaintiffs, all elected Texas officials or legislators, sued as representatives of the class described above and as concerned individuals.[1]

By way of a preface and as we shall see, the authority to purchase land for recreation purposes in Texas is vested in the Texas Parks and Wildlife Commission. There are three members of this Commission. Plaintiff Johnson is one; defendants Gilvin and Jersig are the others. Plaintiff Johnson was outvoted two to one with respect to the purchase of the Mustang Island property. The instant litigation flows entirely from this vote. Plaintiffs would reverse the vote through a flanking action in the federal courts to prevent the use of federal funds to match the state funds which are to be used in the purchase.

One of the issues presented to the district court was the contention that plaintiffs lacked standing to sue. This contention was rejected; the court holding that each of the

[1] The district court sustained a motion to strike all references in the complaint to a class action and permitted the suit to go forward in the names of plaintiffs as individuals.

plaintiffs had standing to sue in his individual and official capacities. We disagree with this determination of the standing issue and therefore reverse.

The issue of standing presents a threshold question to be decided by reference to the allegations contained in the pleadings of the parties plaintiff. *Flast* v. *Cohen,* 1968, 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947; *Baker* v. *Carr,* 1962, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663.[2] As the court stated in *Flast* v. *Cohen,* supra at 101, 20 L.Ed.2d at 962, the concept of standing is derived from the Constitutional limitation of federal court jurisdiction to cases or controversies:

> "Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

See discussion in *Troutman* v. *Shriver,* 5 Cir., 1969, 417 F. 2d 171, 173, cert. den. sub nom. *Troutman* v. *Rumsfeld,* 397 U.S. 923, 90 S.Ct. 915, 25 L.Ed.2d 103, rehearing den., 397 U.S. 1018, 90 S.Ct. 1231, 25 L.Ed.2d 433.

Recognizing this limitation placed upon federal court jurisdiction by Article III of the Constitution, the Supreme Court, in *Data Processing Service* v. *Camp,* 1970, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184, formulated a dual test for standing. The first question to be determined is whether the plaintiffs allege " . . . that the challenged action has caused [them] injury in fact, economic or otherwise." 397 U.S. at 152. The second inquiry is whether the interest

[2] Here the ruling on standing was made after the case was heard on the merits. The record, however, does not disclose any variance between the allegations contained in the pleadings and the evidence adduced upon the hearing.

sought to be protected is " . . . arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. See also *Barlow* v. *Collins,* 1970, 397 U.S. 159, 90 S. Ct. 832, 25 L.Ed.2d 192. Having these principles in mind, we turn now to the allegations of the plaintiffs.

Essentially, plaintiffs rest on federal question jurisdiction, 28 USCA, § 1331, in terms of the Administrative Procedure Act, 5 USCA §§ 701-706, in that they claim to be persons aggrieved by agency action within the meaning of the Federal Land and Water Conservation Fund Act, supra. This latter Act establishes a method for financing the acquisition and development of outdoor recreation resources through a matching fund grant-in-aid program available to states upon application. 16 USCA § 460*l*-8. The stated purposes of the Act are to insure to all citizens of the United States " . . . such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States. . . . "

Prior to consideration of any application for matching funds, a state must submit to the Secretary of Interior a Statewide Comprehensive Outdoor Recreation Plan (SCORP) for his approval. The plan must contain the name of the state agency authorized to act for the state in dealing with the Secretary for purposes of the Act, an evaluation of the state's supply of demand for outdoor recreation resources, a program for implementation of the plan, and other necessary information as required by the Secretary. 16 USCA § 460*l*-8(d). The Secretary may then provide financial assistance to any state for the acquisition and development of land and water resources if the projects

concerned are in accordance with the Statewide Comprehensive Outdoor Recreation Plan. 16 USCA § 460*l*-8(e).

To facilitate the implementation of the foregoing legislative provisions, the authority of the Secretary under the Act has been delegated to the Bureau of Outdoor Recreation. This bureau in turn has promulgated various regulations and procedures for the implementation of the federal grants-in-aid program. These regulations are set out in the Outdoor Recreation Grants-in-Aid Manual (BOR Manual) published by the Department of Interior.

The BOR Manual provides, *inter alia,* that for a state to be eligible for funds, the governor of each state must designate a State Liaison Officer (SLO) authorized to deal with the Director of the Bureau of Outdoor Recreation. BOR Manual, § 600.3.6. The BOR Manual further provides that all project proposals must be reviewed and recommended to the Bureau by the SLO, BOR Manual, § 640.1.1, and that prior to approval, the application may be withdrawn at the written request of the SLO. BOR Manual, § 660.2.3.

Plaintiffs below contended that the approval of federal grants-in-aid funds for the acquisition and development of lands on Mustang Island failed to conform to the foregoing procedures required by the statute and the BOR Manual. Specifically, they urge that the purchase was not authorized by the Texas Comprehensive Plan (SCORP); that the State Liaison Officer did not approve the purchase and sought to withdraw the application for federal funds. In addition, they point to certain alleged in-office or internal procedural irregularities in the handling of the matter by the Secretary.

Mustang Island is a barrier island off the Gulf Coast of Texas approximately six miles east of the city of Corpus

Christi. The Texas SCORP, therefore approved by the Secretary, contained priorities for the acquisition of lands for recreational purposes and contained a study of the recreational needs of the Texas Gulf Coast. The SCORP contained no priority for the acquisition and development of lands in the Corpus Christi area, including Mustang Island.

On November 10, 1971, the purchase of Appellant Wilson's Mustang Island property was considered by the Texas Parks and Wildlife Commission as required by state law. Texas Const. art. 6070h, § 9; Vernon's Ann. Tex. Civ. Stat. art. 3, § 49-e. Two members of the commission (appellants Gilvin and Jersig) voted in favor of the purchase; Pearce Johnson, Chairman of the commission, voted against it. Following this vote, an application for matching federal funds was prepared by defendant Singleton, Executive Director of the Texas Parks and Wildlife Department, and was submitted to Johnson as the duly appointed State Liaison Officer.[3]

Johnson refused to sign the request based upon his determination that the Mustang Island project was not in accordance with the Texas SCORP. The application, nevertheless, was forwarded to the Department of Interior without the approval of Johnson. Thus plaintiffs alleged that although Johnson was the duly appointed SLO charged with responsibility for initiating requests for funds, he did not request the funds involved here, and in fact attempted to have the application withdrawn as provided

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[3] The defendants, in addition to the Secretary and Mrs. Wilson, the landowner, are Messrs. Gilvin, Jersig, Singleton, other officers in the Parks Department, as well as the Treasurer and Comptroller of Texas. All state officer defendants are represented here by the Attorney General of Texas. Plaintiff Johnson, also a state officer, is represented by private counsel.

by the BOR Manual, § 660.2.3.[4] Johnson was joined in his efforts by the Governor of Texas who communicated his views to the Department of the Interior.

The net effect of these allegations is to indicate that the approval and issuance of federal funds for the acquisition and development of Mustang Island may arguably have been in violation of the Federal Land and Water Conservation Fund Act and the Secretary of Interior's own regulations as contained in the BOR Manual.

As concerned citizens for orderly development of recreational resources and as public officials charged with a public trust, the plaintiffs below contend that they are within the zone of interests protected by the Act. See *Data Processing Service* v. *Camp, supra.* Assuming arguendo that this is the case, it is sufficient to state that allegations showing an interest protected by a relevant statute provide only one of the two steps necessary to establishing a party's standing. An injury in fact, arising out of the action complained of, must also appear. See *Data Processing Service* v. *Camp,* supra; *Barlow* v. *Collins,* supra. The zone of interests step is of much importance, however, in deciding if there has been an injury in fact in that the zone of interests facilitates the identification of the interest which is alleged to have been injured in fact. Here the zone of interests created by the Act is making recreational resources available to citizens generally. The particular interest

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[4] On the merits, there is a sharp question as to whether the State Liaison Officer had any real power in the premises in view of the supervening Texas Statute, Vernon's Ann. Tex. Civ. Stat. Art. 6081r, which constituted the Texas Parks and Wildlife Commission as the state agency to cooperate with the federal government with respect to all federal assistance programs having to do with the acquisition and development of outdoor recreation resources, and specifically under the Federal Land and Water Conservation Fund Act here in issue.

allegedly injured must be within the statutory zone of interests.

Thus, we arrive at the determinative question on this appeal — whether the allegations of the plaintiffs were sufficient to show an injury in fact to an interest protected by the Federal Land and Water Conservation Fund Act.

At the outset, we note that there would be no difficulty in finding standing for plaintiffs who could properly allege that the federal expenditure would aid a project which would directly affect aesthetic or environmental interests in which they have a special interest by altering or destroying limited resources. See as examples: *Environmental Defense Fund, Inc.* v. *Hardin,* D.C.Cir., 1970, 428 F.2d 1093; *Nashville I-40 Steering Committee* v. *Ellington,* 6 Cir., 1967, 387 F.2d 179; *Scenic Hudson Preservation Cnf.* v. *FPC,* 2 Cir., 1965, 354 F.2d 608. These decisions employ the aggrieved persons concept within the meaning of relevant statutes creating zones of interest with review under the Administrative Procedure Act, 5 USCA, § 702, as taught in *Data Processing,* supra. *Scenic Hudson,* supra, involved the Federal Power Act, 16 USCA, § 803(a). *Environmental Defense Fund, Inc.* v. *Hardin,* supra, involved the Federal Insecticide, Fungicide, and Rodenticide Act, 7 USCA, § 135-135k and the Food, Drug, and Cosmetic Act, 21 USCA, §§ 301-392. *Nashville I-40,* supra, involved the Federal-Aid Highway Act, 23 USCA, § 101 et seq. *Sierra Club* v. *Hickel,* 9 Cir., 1970, 433 F.2d 24, *cert. granted,* sub. nom. *Sierra Club* v. *Morton,* 1971, 401 U.S. 907, 27 L.Ed.2d 805, ... S.Ct. ....., involving the National Forest Act, 16 USCA, § 497, is a case of this type although the Ninth Circuit concluded that there was no injury in fact without first considering whether a zone of interest existed under a relevant statute. See also Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450 (1970).

Here, as stated previously, the proceeding is brought under the Federal Land and Water Conservation Fund Act, 16 USCA, §§ 460*l*-4 through 460*l*-8 and the Administrative Procedure Act, 5 USCA, § 702. The injury is not direct. It is attenuated at best and does not amount to an injury in fact. The injury alleged is that the acquisition and development of Mustang Island will so deplete state funds available for outdoor resources that it will jeopardize the orderly development of parks in other areas of the state for several years. Plaintiffs are interested in other areas, not in Mustang Island. One particular concern to them is that if state funds are used for the purchase of the Mustang Island property, a proposed project for Lake Livingston, Texas will be foreclosed for lack of funds. Thus they argue that the action by the Secretary of Interior and the other appellants has caused an injury in fact to their interest in the orderly development of Texas recreational resources. Stated differently, they object to the reordering of priorities established by the state for acquiring recreational areas.

At best, the injury complained of amounts to a frustration of their interest in the allocation of state funds for recreational purposes. However, this frustration stems not from the action of the Secretary, despite its alleged illegality, but from the decision of the Texas Parks and Wildlife Commission to devote all available state funds to the acquisition and development of Mustang Island to the exclusion of other areas. This decision is a matter of state policy to which the Secretary of the Interior is not privy. Priorities are a state matter and the action of the Secretary in funding state selected projects on a matching basis is ancillary in scope. We do not perceive that the State Parks and Wildlife Commission could not alter the priorities contained in the present SCORP.

Plaintiffs assert that without the federal funds approved by the Secretary, the purchase of Mustang Island property might not be possible. This argument is insufficient to show injury in fact at the hands of the Secretary. His action, while indirectly related to the claimed injury, does not suffice to establish a federal nexus to the injury. The change in priorities by the state agency is at bottom all that can be said to have a causal connection to the alleged injury. Thus we conclude that the allegations fail to establish injury in fact to plaintiffs in either their individual or official capacities as a result of the action of the Secretary.

The sole federal nexus alleged lies with the action of the Secretary. Since we fail to find a sufficiently direct relationship between the Secretary's approval of the Mustang Island project for grants-in-aid funds and the alleged injury suffered by plaintiffs in either their official or private capacities, we hold that the district court erred in failing to dismiss this action for lack of standing. In the end, plaintiffs' complaint is for a Texas and not a federal forum.

REVERSED and RENDERED.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1375

PEARCE JOHNSON, ET AL,

Plaintiffs-Appellees,

v.

ROGERS C. B. MORTON,
UNITED STATES SECRETARY OF THE INTERIOR, ET AL,

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Feb. 3, 1972, 5 Cir., 1972, ...F.2d.....)

(March 13, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 71-1375

D. C. Docket No. A70-CA-136

PEARCE JOHNSON, ET AL,
Plaintiffs-Appellees,

v.

ROGERS C. B. MORTON,
UNITED STATES SECRETARY OF THE INTERIOR, ET AL,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Before BELL, AINSWORTH, and GODBOLD,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and rendered;

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

February 3, 1972
Issued As Mandate: Mar. 21, 1972

APPENDIX D

Filed Feb. 12, 1971

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-70-CA-136

PEARCE JOHNSON, ET AL,

v.

FRED RUSSELL, ACTING
UNITED STATES SECRETARY OF THE INTERIOR, ET AL,

MEMORANDUM OPINION AND ORDER GRANTING INJUNCTIVE RELIEF

This suit is brought by Pearce Johnson, Chairman of the Texas Parks and Wildlife Commission and three other interested persons, in their individual capacities and as representatives of "all Texas citizens who are for the orderly development of Texas parks and recreational facilities in accordance with the State Comprehensive Outdoor Recreation Plan" (SCORP), to enjoin a purchase by the state of certain property on Mustang Island for the purpose of creating a state park. Defendants are the Secretary of the Interior and his Department, two members of the Texas Parks and Wildlife Commission, members of the Commission's executive staff, the state comptroller and treasurer, and an owner of the property in question.

Mustang Island is a barrier island on the Gulf Coast approximately six miles east of Corpus Christi, Texas, a substantial portion of which is owned by Mrs. Sam Wilson, Jr. and others. In early December, 1970, two of the three members of the Texas Parks and Wildlife Commission signed and submitted to the Bureau of Outdoor Rec-

reation, Department of the Interior, an application for federal matching funds under the Land and Water Conservation Act to help finance the state's acquisition of 3,965 acres of the Wilson property for development as a state park. Under authority delegated by the Secretary of the Interior, the acting Director of the Bureau of Outdoor Recreation subsequently approved the application, and federal funds in the amount of $2,181,125.00, representing one-half the purchase price, were deposited in the state treasury for payment to the sellers as soon as the state obtained necessary matching funds through the sale of securities in the state's park development fund.

At this point, plaintiffs herein applied for a temporary restraining order, alleging that the proposed Mustang Island acquisition had been approved by the Secretary in violation of the Land and Water Conservation Act and the regulations of the Bureau of Outdoor Recreation, as well as certain provisions of state law, and that the state would suffer irreparable harm to its planned program of park acquisition and development through the depletion of state funds should the purchase of the land in question be consummated as planned. On December 29, 1970, this Court GRANTED the temporary restraining order requested, pending a further hearing on preliminary injunction. Defendants promptly prosecuted an emergency appeal of this Order to the Fifth Circuit Court of Appeals, and on December 31, 1970, Circuit Judge Joe Ingraham entered an Order granting a "stay" of this Court's temporary restraining order pending determination of the appeal by a panel of that court. Since Judge Ingraham's order, by its express terms, did not purport to affect the jurisdiction of this Court to proceed with the merits of the case, and because defendants elected to maintain the status quo because of their uncertainty as to the precise effect

of that order, this Court subsequently conducted a full hearing on preliminary injunction and enters this memorandum opinion and order pursuant to the determinations of fact and law made therefrom. It is the conclusion of this Court that an injunction must issue enjoining the use of federal funds for the Mustang Island acquisition until the requirements imposed on the Secretary by the Land and Water Conservation Act and by the regulations of the Bureau of Outdoor Recreation have been met.

PRE-TRIAL MOTIONS

Prior to the hearing on preliminary injunction, various motions were tendered to the Court by one or more of the defendants. These included: motions by all defendants to dismiss for lack of jurisdiction or for failure to state a claim upon which relief may be granted; motions by defendant Wilson and state defendants to dismiss to the extent the suit is maintained as a class action and to abstain from the exercise of jurisdiction; a motion by federal defendant to dismiss for lack of standing to bring suit; and motions by defendant Wilson to advance and consolidate trial on the merits with the hearing on preliminary injunction, and to require plaintiffs to post bond. This lawsuit arose very rapidly, foreclosing the usual discovery and other pre-trial procedures; the Court therefore deemed it appropriate to defer decision on these motions until enough evidence had been adduced at the hearing to permit clearer delineation of the issues in controversy. Since this point was not reached until relatively late in the proceedings, the Court has further seen fit to wait and dispose of the motions in this memorandum opinion as follows:

A. Jurisdiction. The three jurisdictional grounds alleged in the complaint are 28 U.S.C. § 1331, 1361, and the

judicial review provisions of the Administrative Procedure Act, 5 U.S.C.A. § 701-706. The sole brief advanced in support of the motions quite properly addresses only the first two grounds alleged, because it is quite clear that the Administrative Procedure Act does not extend the jurisdiction of federal courts to cases not otherwise within their competence. 5 U.S.C.A. § 703 provides in pertinent part:

> "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for . . . writs of prohibitory or mandatory injunction . . ., in a court of competent jurisdiction."

It has consistently been held that this provision does not of itself establish jurisdiction over an action not otherwise cognizable by the Federal Courts. Pan American World Airways, Inc. v. C. A. B., 392 F.2d 483 (D.C. Cir. 1968); Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912 (2d Cir. 1960); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir. 1955). Of the remaining jurisdictional grounds alleged, the Federal Mandamus Act, 28 U.S.C. § 1361, is clearly not a basis for subject matter jurisdiction in this type of suit. Historically, mandamus has been used to compel the performance of a ministerial duty, and before a writ may issue it must appear that the claim is clear and certain, and that the duty of the officer involved is ministerial, plainly defined, and peremptory. The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt. Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir. 1966), cert. denied, 385 U.S. 831 (1966). This is obviously not such a case.

However, the complaint does present a substantial federal question cognizable under 28 U.S.C. § 1331, namely whether the Secretary of the Interior has exceeded the statutory authority conferred upon him by 16 U.S.C.A. § 4601-8 by approving a state land acquisition project that is not in accordance with the statewide comprehensive outdoor recreation plan required by the statute. Defendants' contention that the action taken by the Secretary was within the range of discretion granted to him by §4601-8 merely states the converse of the question presented. Plaintiffs assert a substantial claim in part founded directly upon a federal statute that has not yet been construed in any reported decision, and since the requisite jurisdictional amount is clearly in controversy, this Court has jurisdiction.

B. Abstention. Alternatively, the Court is urged to abstain from the exercise of its jurisdiction under the doctrine established in Railroad Commission of Texas v. Pullman Co., 312 U.S. 96 (1941). Movants assert that the case involves "overwhelmingly predominant" questions of state law, such as the interpretation of Texas statutory and constitutional provisions and the validity under Texas law of the action of Commissioners Jersig and Gilvin in undertaking to purchase Mustang Island, which, if decided in favor of the plaintiffs by the Texas state courts, would prevent the use of state funds and thus obviate the necessity to decide prematurely a question of federal law, since federal matching funds are available only if state funds are available. There are at least three impediments to this course of action. First, although the Pullman doctrine is very much alive today, Reetz v. Bozanich, 397 U.S. 82 (1970), it rests upon the principle that where unsettled state law questions are enmeshed with federal constitutional questions, and where resolution of the state

law questions in the state courts would obviate the necessity to consider the constitutional issues, the court should stay the exercise of its jurisdiction pending such state court determinations in order to avoid deciding a constitutional decision unnecessarily. City of Meridan v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959). In the present case no federal constitutional question is involved, and the applicability of the doctrine is therefore doubtful. Second, the Texas Supreme Court has held, in United Services Life Insurance v. Delaney, 396 S.W.2d 855 (1966), that the state court declaratory judgment action resulting from the abstention procedure requires Texas state courts to render advisory opinions in contravention of the Texas Constitution. This decision appears to foreclose abstention by stay in Texas. Third, abstention invariably causes substantial delay, and the Court is of the opinion that it is in the best interest of all parties to bring this controversy to a close as rapidly as possible. For these reasons, abstention will not be ordered.

C. Class Action. Without proceeding to any of the other contentions made in the motion, this Court agrees that the phrase "all Texas citizens who are for the orderly development of Texas Parks and Recreational Facilities in accordance with the State Comprehensive Outdoor Recreation Plan" does not identify an adequately defined and clearly ascertainable class of persons, and that this suit therefore may not properly be maintained as a class action under Rule 23, Federal Rules of Civil Procedure. DeBremaecher, etc v. Herman Short, No. 29850 (5th Cir. November 3, 1970) (Slip Opinion); Weisman v. M.C.A. Inc., 45 F.R.D. 258 (D.Del 1968); Hardy v. United States Steel Corporation, 289 F.Supp. 200 (N.D.Ala. 1967). However, the remedy for this defect is not dismissal if the action is still maintainable by the plaintiffs in their individual

capacities. Since this Court also holds that the individual plaintiffs state a cognizable claim, all references to a class action in the pleadings will be ordered struck and the plaintiffs will be allowed to proceed individually. Rule 23(d)(4), Federal Rules of Civil Procedure.

D. Standing. Although the question of standing has long been a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations," United States ex. rel. Chapman v. F.P.C., 345 U.S. 153, 156 (1953), recent decisions of the Supreme Court have considerably broadened and simplified the inquiry. The concept now "focuses upon the party seeking relief, rather than on the precise nature of the relief sought," Jenkins v. McKeithen, 395 U.S. 411, 423 (1969), and is satisfied if the plaintiff sufficiently alleges (1) an "injury in fact, economic or otherwise," and (2) an interest that is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Data Processing Services v. Camp, 397 U.S. 150, 153 (1970); Arnold Tours Inc. v. Camp. ..... U.S. ....., 27 L.Ed. 2d 179 (1970). The Data Processing opinion emphasizes that the standing conferred upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute" by the Administrative Procedure Act, 5 U.S.C. § 702, may stem not only from economic injury, but from "aesthetic, conservational and recreational" values. 397 U.S. at 154. Such values have specifically been recognized as bases for standing in recent lower federal court decisions, though with differing results on individual facts. E.g., Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir. 1965); Nashville I-40 Steering Committee v. Ellington, 387 F.2d 179 (6th Cir. 1967); Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97

(2d Cir. 1970); Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970); Alameda Conservation Association v. State of California, No. 22,961 (9th Cir. Jan. 23, 1971) (Slip opinion). These decisions leave no doubt that if the tests established by the Data Processing opinion are met, plaintiffs may not be denied standing simply because the factual injuries they allege are to recreational rather than economic values.

As to the injury in fact requirement, the plaintiffs in the present case allege that the proposed acquisition of Mustang Island as a state park is a serious departure from SCORP, which will jeopardize the orderly acquisition and development of state parks in other areas of the state for several years by depleting state funds available for these purposes. The complaint further reveals that none of the plaintiffs are residents of the Corpus Christi area, but rather reside in other areas of the state that apparently would be directly and adversely affected by the proposed acquisition. Moreover, each plaintiff has testified that he has used existing state park facilities with some degree of regularity, and that he has a keen personal interest in the acquisition and development of state parklands in localities other than the Corpus Christi area. This is particularly evident in the case of Plaintiff Walters, County Judge of Polk County, Texas, who testified that he has represented his community before the Parks & Wildlife Commission and performed other instrumental services in connection with a planned acquisition project at Lake Livingston, Polk County, which would allegedly be foreclosed by lack of state and federal funds if the Mustang Island acquisition is consummated. It therefore appears that if the alleged violation of SCORP will have the adverse statewide results claimed, each of the plaintiffs would obviously sustain some degree of injury to his personal recreational interests. At some point a line must be drawn

between substantial and insubstantial injury in fact; otherwise the concept of standing would have no meaning at all. However, in view of the increasingly liberal trend of recent decisions in this area, this Court is inclined to the view that it is better to resolve doubtful questions in favor of the plaintiff on the standing issue, and that these plaintiffs have in their private capacities alleged sufficient injury in fact to meet the requirement of the law.

If more is needed, it should be observed that three of the plaintiffs stand in an official posture with respect to this controversy. Plaintiff Johnson, as the appointed Chairman of the Texas Parks and Wildlife Commission is the executive head of the agency, responsible under state law for the administration of outdoor recreational resources. He also is the appointed State Liaison Officer in accordance with the requirement of the BOR Manual. Plaintiff Atwell is a State Representative currently serving on the House Revenue and Taxation Committee and Legislative Budget Board of the Texas Legislature, both of which bear responsibility in the allocation of state funds for outdoor recreation. Plaintiff Kennard is a State Senator currently serving on the Senate Parks and Wildlife and Finance Committees. Each of these plaintiffs therefore occupies a position of public trust and responsibility in respect to the state's outdoor recreation policy, and should be accorded standing to litigate questions affecting that policy. This conclusion is aided by the holding in Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967), where the court granted a state banking commissioner standing to intervene in an action to enjoin the Comptroller of the Currency from authorizing a national bank to open a branch office in violation of state law. The court stated:

> "Administrative cases, as the present one demonstrates often vary from the norm. We should not be

> niggardly in gauging the interest of a state administrative officer in the validity of what his federal counterpart has done in an area of overlapping fact and intertwined law. We not only have the greater impetus to intervention that inheres in administrative cases, but in addition the 'interest' of the state commissioner is underlined by the circumstances that the regulation of national banking is an area in which Congress, in the exercise of delegated federal power, has for various policy reasons decided to adopt and incorporate state law on issues of common concern. This admixture of national and state policies, attaching national legal force to the state policy, yields the corollary that a state official directly concerned in effectuating the state policy has an 'interest' in a legal controversy involving the Comptroller which concerns the nature and protection of the state policy." 385 F.2d at 900.

Although this decision was made within the framework of the intervention provisions of Rule 24, Federal Rules of Civil Procedure, the same principle has been applied in a similar case to uphold the standing of a State Superintendent of Banks under the Administrative Procedure Act. Leuthold v. Camp, 273 F.Supp. 695 (D.Mont. 1967); aff'd, 405 F.2d 499 (9th Cir. 1969). This rationale is especially important where, as here, the duties of Plaintiff Johnson as State Liaison Officer and as Chairman of the Parks and Wildlife Commission inherently involve an interrelationship of state and federal law due to the involvement of both state and federal financing. The federal defendant must consider not only federal law, regulations, and Executive Orders, but also the State Comprehensive Outdoor Recreation Plan ("SCORP") and relevant state law in considering the application presented to it for the acquisition of Mustang Island. Plaintiff Johnson, in his official capacities, must also give consideration to state law and the SCORP, as well as to the Federal Land and Water

Conservation Fund Act and the regulations promulgated thereunder in the BOR Manual. This admixture of national and state policies clearly provides a basis for an allegation of "injury in fact" to the interest of Plainitff Johnson in properly and responsibly performing his public duties, and it is similarly deemed sufficient in respect to Plaintiffs Atwell and Kennard.

Plaintiffs clearly meet the second test of standing by alleging interests that are "arguably within the zone of interests to be protected or regulated by the statute . . . in question." As evidenced by the statement of Legislative intent contained in the statutory provisions establishing the Federal Outdoor Recreation Program[1]. and federal assistance to states under the Land and Water Conservation Act,[2] it was the clear purpose of Congress to protect the interest of all citizens in the acquisition, development and use of outdoor recreational facilities. Since all of the plaintiffs allege that they are interested in the orderly acquisition and development of parks in accordance with SCORP, a planning document required by the statute in question, they arguably demonstrate in their private capacities interests within the zone of interests to be protected by the statute. Morever, upon analysis under the principle of Leuthold v. Camp, supra, Plaintiffs Johnson, Atwell and Kennard demonstrate other such interests in their official capacities.

Indeed, it is difficult to imagine anyone more logically suited to bring this action than these plaintiffs. Each is, by virtue of his official status or activities, in a position to understand and appreciate more fully than the ordinary citizen the range of factors bearing on parkland acquisition and the extent to which SCORP reflects these factors in land acquisition priorities. Each is therefore in a better position than the ordinary citizen to allege and attempt to

prove that the Mustang Island proposal is not in accordance with SCORP. This Court accordingly holds, because of all the foregoing reasons, that all plaintiffs are persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute" within the meaning of 5 U.S.C. § 702, as that provision has been construed by the Supreme Court, and therefore have standing to bring this suit.

E. Failure to State a Claim. In the only brief submitted in support of this motion to dismiss, defendants seek to characterize the complaint wholly as a collateral attack upon, or appeal from, the administrative determinations of the Texas Parks and Wildlife Department. Defendants would thus apparently have the Court ignore the clearly and specificially pleaded claims that, by approving the application submitted to BOR by Commissioners Jersig and Gilvin, the Secretary of the Interior exceeded his statutory authority under 16 U.S.C.A. § 4601-8 and violated his own regulations. These claims clearly fall within the scope of judicial review permitted under the Administrative Procedure Act, 5 U.S.C. § 708 (1) (A) (C) and, if they are proved, injunctive relief is an appropriate remedy. Judicial review of the Secretary's actions may in many cases be narrowly limited to determining whether he has acted arbitrarily and capriciously, e.g. Zwang v. Udall, 371 F.2d 634 (9th Cir. 1967), or interpreted his regulations in an inconsistent or plainly erroneous manner, e.g., Gray v. Johnson, 395 F.2d 533 (10th Cir. 1968), or in a manner plainly beyond the bounds of reason or authority, Udall v. Delschlaeger, 389 F.2d 974 (D.C. Cir. 1968). Yet in view of the patently inadequate grounds asserted in support of this motion, it appears again necessary to recite the time-encrusted rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can

prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 46 (1957); Westinghouse Electric Supply Co. v. Wesley Construction Co., 414 F.2d 1280 (5th Cir. 1969). The motion to dismiss for failure to state a claim is accordingly denied.

F. Advancement and Consolidation of Trial on Merits. This motion, which plaintiffs do not oppose, is advanced subject to any contested issues of material fact found by the Court to exist, as to which defendant Wilson and the state defendants demand trial by jury. The Court does find that there are such issues in the case, but since this is an action wholly for injunctive relief there is no constitutional or statutory right to jury trial thereof within the meaning of Rule 38(a), Federal Rules of Civil Procedure. United States v. State of Louisiana, 339 U. S. 699 (1950); see, 2B BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 875 (Wright ed. 1961). Defendants' demand for jury trial is accordingly denied, and there being no further impediment to advancement and consolidation of trial on the merits with the hearing on preliminary injunction, this memorandum opinion and order shall constitute the final determination by this Court on the merits of this lawsuit. see Rule 65(a)(2), Federal Rules of Civil Procedure.

G. Motion to Require Plaintiffs to Post Bond. The basis of this motion is the allegation of defendant Wilson, which is not supported by sworn affidavit or by any evidence adduced at the hearing, that the failure of the State of Texas to comply with its sales agreement as a result of this proceeding has deprived her of the use of the agreed purchase price, the value of which (calculated at the rate of 6%) amounted to $14,237.26 for the period between December 28, 1970 and January 19, 1971, and has increased in the amount of $647.16 each day thereafter. She therefore re-

quests an order requiring plaintiffs in their capacity as private individuals to post a good and sufficient bond in an amount that will adequately secure her, and her co-owners against any damages she may ultimately suffer from any injunctive relief found to be wrongfully granted.

Despite the apparently mandatory terms of Rule 65(c), Federal Rules of Civil Procedure, which provide for security in such cases, it is generally held that the requiring of bond and the amount thereof are matters resting with the discretion of the court. Urbain v. Knapp Bros. Mfg. Co., 217 F.2d 810 (6th Cir. 1954), cert. denied, 349 U.S. 930 (1954); Halpert v. Engine Air Service, 212 F.2d 860 (2d Cir. 1954), cert. denied, 348 U.S. 854 (1954); Powelton Civic Home Owners Ass'n v. H.U.D., 284 F.Supp. 809 (E.D. Pa. 1968). It further appears that the security provisions of Rule 65 were intended to protect against damages resulting from the improvident issuance of an injunction in advance of full hearing, United States v. Onan, 190 F.2d 1 (8th Cir. 1951), a consideration that is now moot. For this reason, and because the Court believes the damage asserted is speculative in light of the absence of substantiating evidence, no bond will be required of plaintiffs.

THE MERITS

A. Scope of Review.

A preliminary issue is whether the action of the Secretary in approving the Mustang Island project application "is committed to agency discretion by law" within the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C.A. § 701, and therefore not susceptible to judicial review. Since almost every agency action involves some degree of discretion, the analytical problem presented has accurately been stated to be whether the particular

discretionary act challenged falls within the prohibition of Section 10 or merely "involves" discretion that is nevertheless reviewable. Ferry v. Udall, 336 F.2d 706, 711 (9th Cir. 1964); 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16.

This determination largely depends upon the legislative intent discernible from the relevant statutory language. Admittedly, Section 5 of the Land and Water Conservation Act of 1965, 16 U.S.C.A. § 4601-8, appears to confer a wide measure of discretion upon the Secretary to administer financial assistance to states for the planning, acquisition and development of outdoor recreation resources. For example, under subsection (a) he is authorized to make payments to the states as provided by the statute "subject to such terms and conditions as he considers appropriate and in the public interest to carry out the purposes" of the Act, and under subsection (c) each state need only bear its share of the costs of acquisition in a manner "satisfactory to the Secretary." Moreover, in subsection (b) Congress appears to have foreclosed judicial review of the Secretary's apportionment among the states of funds appropriated and available for state purposes by providing that his determinations, under a formula itself granting wide discretion, "shall be final."

However, in drafting the statutory provisions relied upon by plaintiffs in this suit, Congress spoke in mandatory terms. Subsection (d) requires a "statewide comprehensive outdoor recreation plan" prior to consideration by the Secretary of financial assistance for acquisition or development projects. Although the adequacy of such plan rests with the "judgment of the Secretary," the plan must contain "an evaluation of the demand for and supply of outdoor recreation resources and facilities in the state" and "a

program for the implementation of the plan." Further, it must "take into account relevant Federal resources and programs" and must be "correlated so far as practicable with other State, regional, and local plans." Subsection (e) requires that land acquisition projects be "in accordance with the statewide comprehensive outdoor recreation plan" as a condition to the providing of assistance by the Secretary. Had the Congress wished, it could have couched these provisions in permissive language and inserted terms purporting to limit judicial review, as it did elsewhere in the statute. That Congress did not do so warrants the conclusion that it did not intend to grant to the Secretary unbridled discretion to approve any project that might meet his fancy, and this Court so holds. The action of the Secretary in approving a land acquisition project under Section 5(e) of the Land and Water Conservation Act, 16 U.S.C.A. § 4601-8(e), is not "committed to agency discretion by law" under Section 10 of the Administrative Procedure Act, and is reviewable along with the regulations adopted by the Secretary to govern such approvals.

The Court has considered the actions of administrative agencies held non-reviewable in Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958); Kendler v. Wirtz, 388 F.2d 381 (9th Cir. 1968); and Ferry v. Udall, 336 F.2d 381 (9th Cir. 1964), but finds the statutory schemes and agency actions involved therein sufficiently different from the case at bar to render those decisions not in point. Moreover, the recent judicial tendency to hold reviewable, explicitly or implicitly, the actions of the Secretary of the Interior under a wide variety of statutory schemes cannot be ignored. See, Udall v. Tallman, 380 U.S. I (1965); Udall v. Oelschlaeger, 389 F.2d 974 (D.C. Cir. 1968); Harvey v. Udall, 384 F.2d 883 (10th Cir. 1967); Zwang v. Udall, 371 F.2d 634 (9th Cir. 1967); Pan American Petroleum Cor-

poration v. Udall, 352 F.2d 32 (10th Cir. 1965); Pressentin v. Seaton, 284 F.2d 195 (D.C. Cir. 1960); Johnson v. Udall, 292 F. Supp. 738 (C.D. Cal 1968).

The scope of review permitted by Section 10 of the Administrative Procedure Act includes all relevant questions of law, and of interpretations of statutes and agency actions that are necessary to a determination of whether the agency action challenged is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C.A. § 706. In respect to the actions of the Secretary of the Interior, however, the Supreme Court has recently stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officer or agency charged with its administration. . . . "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work smoothly while they are yet untried and new.'" Power Reactor Co. v. International Union of Electrical, etc., 367 U.S. 396, 408. . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.
>
> ". . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414. . . . Udall v. Tallman, 380 U.S. I, 16-17 (1965).

These standards of review must govern any consideration by this Court of the statutory and regulatory violations alleged by plaintiffs.

B. The Secretary Exceeded his Statutory Authority in Approving the Application.

As noted above, Section 5(e) of the Land and Water Conservation Act provides that the Secretary may provide assistance for land acquisition if the project is "in accordance with the State comprehensive plan." Plaintiffs allege that the Secretary violated this provision in approving the Mustang Island application because the land in question was not included in the priorities for acquisition of Gulf Coast land set out in SCORP. In response, defendants first contend that even if the application was not in accordance with SCORP, the Secretary was free to approve the project under the discretion granted to him by the Act, and, alternatively, that the project was in fact in accordance with SCORP as the Secretary interpreted that document. Although under the authorities cited above the Secretary's position on both issues must be accorded great weight, this Court cannot agree with either proposition.

The contention that the Secretary may, in his discretion, simply disregard the state plan in granting financial assistance runs contrary to the plain language of Section 5 (e). It further contravenes the Congressional intent manifest throughout the Act to preserve the integrity of state comprehensive planning against hastily considered and approved projects resulting from the influence of regional political pressures or temporarily popular causes upon the state and federal officials charged with administering outdoor recreation programs. The clear legislative purpose was to restrict federal aid under the Act to projects that fit into a comprehensive state scheme designed to promote the orderly and systematic acquisition and development of outdoor recreation resources in accordance with empirically determined state needs and priorities. The statements of legislative purpose contained in Section

(b) of the Act, 16 U.S.C.A. § 4601-4, and the somewhat meager legislative history on the point, which emphasizes the "pivotal" and "predominant" vote to be played by the the states in the outdoor recreation field reinforce this view. SEN.REP.NO. 1364, 88th Cong. 2d Sess. (1964), [1964] 2 U.S.CODE CONG. & ADMIN. NEWS 3633, 3658.

The issue is thus narrowed to whether the Secretary through his delegees, properly determined that the Mustang Island application was in accordance with SCORP. Under Section 10 of the Administrative Procedure Act, 5 U.S.C.A. § 706, review of the Secretary's factual determination may not proceed as a trial de novo, but must rather be limited to ascertaining whether there was a reasonable basis for the Secretary's conclusion. This Court may not substitute its judgment for that of the administrative agency. Gray v. Powell, 314 U.S. 402 (1941); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965). Yet the evidence adduced at the hearing conclusively demonstrates the Bureau of Outdoor Recreation did not have before it facts affording a reasonable basis for its conclusion that the Mustang Island application was "in accordance with the State comprehensive plan."

In making this determination, only the testimony of Mr. Maurice Arnold, Regional Director, Mid-Continent Region, Bureau of Outdoor Recreation, and his records pertaining to the project in question (Government Exhibit I) have been considered, and the Court is satisfied that this reflects the entire factual basis upon which Bureau approval of the project was given.

Both the testimony and the records show that SCORP itself (Plaintiffs' Exhibit 33A-33F) was considered by Mr. Arnold's staff in making its recommendation to him, and by Mr. Arnold in recommending approval of the project to the Director of the Bureau. This document consists in

the main of a voluminous and exhaustive statistical analysis of the demand for and the supply of the state's existing and projected outdoor recreational resources in nine geographical Planning Regions, accompanied by policy guidelines, special studies, and recommendations. Mustang Island is located in Planning Region IX, which includes approximately the southern half of the Texas Gulf Coast. The remainder of the Texas Gulf Coast, and consequently the remainder of comparable beach land in the state, is located in Planning Region VIII. In respect to the state's land acquisition program, the plan initially states: "Until additional data is obtained, a more specific land acquisition program other than that designated in regional needs (Sec. 4.0) cannot be made." 0 SCORP 42 (Plaintiffs' Exhibit 33A). Section 4.0 identifies the shortage of government-administered land along the coast as a major problem, SCORP 4.0.0.1 (Plaintiffs' Exhibit 33E), but in a subsequent statewide land analysis notes that "The most critical areas of shortages at the present for land appear to be in Regions I, VI, VII, and VIII." SCORP 4.0.1.0 (Plaintiffs' Exhibit 33E). Section 4 specifically refers to the Texas Gulf Coast Study, SCORP 7.5.1 (Plaintiffs' Exhibit 33F), for a fuller analysis of land acquisition considerations along the coast. SCORP 4.0.0.1 (Plaintiffs' Exhibit 33E). This study, which is characterized in the preface to Section 7 of SCORP as "almost a comprehensive plan in itself," fully discusses, and recommends for acquisition and development, five beach areas along the Texas Gulf Coast. Four of these areas lie in the upper and central coast in Planning Region VIII and one lies near Brownsville in Planning Region IX, but none of the areas recommended include Mustang Island. SCORP 7.5.1.2 (Fig. I), 7.5.1.3 (Plaintiffs' Exhibit 33F). With the exception of the area near Brownsville, which the study recommends for acquisition because of the peculiar problems of access to public beach

lands experienced in that locality, these recommendations are fully substantiated by the statistical data compiled on Planning Regions VIII and XI. e.g., SCORP 2.0.0.3, Figs. 10-11 (Population density) 2.0.1 Table VB, C (percent of state population), 2.8.2.15.2, 2.9.2.15.2 (demand for swimming beaches) (Plaintiffs' Exhibit 33A); SCORP 3.8.2.15.3, 3.9.2.15.3.2 (supply of open Gulf salt water beaches) (Plaintiffs' Exhibit 33D); SCORP 4.8.2.15B, 4.9.2.15B (Need for swimming beaches) (Plaintiffs' Exhibit 33E). It is abundantly clear from a reading of the above-cited materials that the Mustang Island application is not in accordance with the land acquisition program established by SCORP. The foregoing analysis has not, however, been set out in an attempt to substitute this Court's own judgment for that of the responsible officials in the Bureau of Outdoor Recreation. It does show conclusively that to the extent these officials relied solely upon the literal provisions of SCORP in determining that the Mustang Island application was in accordance with the statewide comprehensive plan, their determination lacked a reasonable basis.

It is also clear from the evidence, however, that the "state comprehensive plan" is not, and indeed could not be, a static concept limited to the literal provisions of SCORP. This document which was prepared in 1967, contains frequent references to the tentative nature of the data upon which it is based. It further says:

> "The Plan is not an end in itself, but rather an instrument designed to accomplish an end. As such it will have to be continually revised and refined to account for new innovations, recreation trends, and changing conditions, ..." SCORP 0. (Plaintiffs' Exhibit 33A).

In particular, the Texas Gulf Coast Study indicates a need for a more comprehensive study of the coast in light of the roles to be played by governmental agencies at all levels in

perpetuating coastal resources for the public. SCORP 7.5.1.3 (Plaintiffs' Exhibit 33F). Realistically speaking, SCORP appears to be intended as a working framework to which the state planners may add newly-acquired data and further conclusions and recommendations as these become necessary. This concept of the state comprehensive plan seems entirely consistent with the purposes of the Land and Water Conservation Act so long as the identity of the planning process within the Parks and Wildlife Department remains intact. Such additions to the plan, perhaps in the form of formal amendments, official memoranda, priority lists or other indicia of changes to the basic plan, might therefore afford a reasonable basis for the Bureau's conclusion that the Mustang Island application was in accordance with the plan. However the record contains not one shred of evidence that such additional indicia of the plan's current content, if any, were before the Bureau of Outdoor Recreation at the time the application was approved Defendants have instead offered only out-of-context statements from SCORP indicating the general desirability of acquiring Gulf Coast Land, together with other documents bearing no meaningful relation to SCORP or to the planning process used by the Parks and Wildlife Department (Defendants' Exhibits G, H, I, J and M). Since none of these provide any reasonable basis for the Bureau's determination, this Court holds that the Director of the Bureau of Outdoor Recreation, as delegee of the Secretary of the Interior, exceeded his statutory authority under Section 5 (e) of the Land and Water Conservation Act by approving the application in question.

C. The Secretary Violated His Own Regulations in Approving the Application.

The Bureau of Outdoor Recreation has published and made available for sale through the Superintendent of

Documents, U.S. Government Printing Office, an Outdoor Recreation Grants-in-Aid Manual (BOR Manual, Plaintiffs' Exhibit 42) that provides information concerning federal aid to the states under the Land and Water Conversation Act and establishes regulations governing the submission of project requests. Plaintiffs have introduced evidence that, unless the Bureau's interpretation of the regulations be accepted, clearly shows these regulations to have been violated by the Bureau in acting on the application. Again, the Court is aware that the agency's interpretation of its own rules is entitled to controlling weight unless it is "plainly erroneous or inconsistent with the regulation." Udall v. Tallman, supra, at 16-17. However, regulations validly prescribed by an administrator are binding on him as well as the citizen even when the agency action under review is discretionary in nature. Service v. Dulles, 354 U.S. 363 (1957). Therefore, unless the Bureau's approval of the application in apparent violation of its regulations can be saved by the agency's interpretation of those regulations, it must be set aside.

1. Appraisal Requirements.

Perhaps the most obvious discrepancy in this regard is the failure to include in the application an appraisal of the property sought to be purchased. Section 675.2.1 of the BOR Manual states that: "Generally, the market value standard will be used as the basic measure of Bureau assistance on acquisitions . . . . Fund assistance shall be based upon evidence of this value." Section 675.2.3 requires each acquisition to be documented by an appraisal report and evidence of purchase price and of title. Section 675.2.4.A provides that the "Bureau will review appraisal reports for adequacy and consistency, including a review of the qualifications of appraisers." Section 675.2.5.A pro-

vides specifically that if the project will cost $25,000 or more the prescribed formal appraisal requirements must be met. Other requirements concerning appraisals are contained in Sections 675.2.1.B, 675.2.1.6, and a letter amendment dated June 20, 1969. The undisputed evidence shows that at no time prior to the actual transfer of federal funds into the state treasury did the official submitting the application comply with any of these provisions.

Under the Bureau's interpretation of the regulations, however, defendants assert that the Bureau waived the appraisal requirements or alternatively that under what was styled the "project time" theory, no appraisal was required until "final payment" was made by the Bureau.

Both of these interpretations are plainly inconsistent with the regulations. As to the waiver contention, Section 675.2.4B of the Manual does provide that the Bureau may waive its documentation requirements "upon request or upon its own initiative," but that "when a waiver is needed, it should be requested by the State Liaison Officer." However there is no evidence that the Bureau ever waived the requirements, nor that the State Liaison Officer ever requested such a waiver, prior to the transfer of federal funds. As to the "project-time theory", the Bureau contends that the transfer of federal funds in this case was merely an advance under Section 675.6.2 of the Manual, and that in accordance with Section 675.2.2 when advance payments are made "the level of Federal participation will later be determined as the amount which is adequately supported." On this basis, the Bureau asserts that the appraisal required need only be submitted some time within a year after the "advance" was given. While the legality of the entire procedure for "advance payments" may well be suspect in light of Section 3648, Revised Statutes of the United

States, 31 U.S.C.A. § 529[3], it suffices to observe that the interpretation of the Bureau, insofar as it applies to the fact situation in this case, is wholly inconsistent with the whole text of the regulations cited. It is clear that the *only* impediment to full and final conclusion of this entire transaction on December 31, 1970, was the temporary restraining order entered by this Court on December 29, 1970, and that up to and including those dates, no mention of an "advance" was ever made in any of the correspondence or other negotiations between the state officials and the Bureau.

2. State Liaison Officer Approval, and Withdrawal of Requests.

Plaintiff Johnson, who is the Chairman of the Texas Parks and Wildlife Commission, is also the appointed State Liaison Officer (SLO) prescribed by Section 600.3.6 of the Manual. The regulations provide: "All project proposals from a state, regardless of origin, must be reviewed by the SLO and recommended by him to the Bureau," Section 640.1.1; the agreement forms for the project "must be submitted to the appropriate Regional Office by the State Liaison Officer," Section 660.1.3B; and "An approved project can be withdrawn by the State at any time before the first billing is submitted, at the written request of the SLO," Section 660.2.3. The undisputed evidence shows that Plaintiff Johnson never approved or recommended the Mustang Island application, never submitted any agreement forms to the Regional Office, and did unsuccessfully request withdrawal of the project following its approval by the Bureau

[3] 31 U.S.C.A. § 529 provides in pertinent part: "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law." No such authorization appears in the Land and Water Conservation Act of 1965, and the Court has found no other law authorizing such advances of acquisition assistance under this Act.

but before the "first billing [was] submitted." The only explanation for this plain inconsistency with the regulations offered by the Bureau was the vague and specious contention that the Bureau frequently "interpreted" the word "will" in the regulations as permissive in meaning, and the word "shall" as mandatory, that the meaning of the term "State Liaison Officer" had undergone some unspecified change since the regulations were drafted and that the cited provisions therefore did not apply to the situation presented in this case. This position is completely refuted by Plaintiffs' Exhibits 61 through 66, which show that the Bureau subscribed to just the opposite interpretation until this suit was filed. Moreover, the "interpretation" offered is simply no interpretation at all, and in the absence of some more concrete explanation, the Bureau must be held to the plain terms of these regulations.

3. State Clearinghouse Comments.

Section 660.1.1 of the Manual, after establishing produres for obtaining state and regional clearinghouse comments upon proposed projects in acordance with Bureau of the Budget Circular A-95 (Plaintiffs' Exhibit 39), provides that "Each application to BOR must be accompanied by either the comments of the appropriate clearinghouses or a statement that the required procedures were followed and no comments were received." Section 511.2.1A Departmental Manual of the Department of the Interior, which was amended on June 3, 1970, to secure compliance by all Bureaus and offices with Bureau of the Budget Circular A-95, provides that "No applications will be approved unless such procedures are followed" and that "Bureaus and offices shall fully consider the reviews and comments provided through or by the clearinghouses in making a decision to approve or disapprove an application

for assistance." In this case, the prescribed procedures for clearinghouse review were not followed, no comments were forwarded with the application, and no state clearinghouse comments were before the Bureau at any time prior to either approval of the project or transfer of federal funds. The Bureau similarly offered no satisfactory "interpretation" that would show compliance by the Bureau with these regulations.

4. Executive Order 11237.

Although this document requires the Secretary to grant assistance under the Land and Water Conservation Act only for projects in urbanized areas which are consistent with the state comprehensive plan, its purpose is to achieve coordination between the Secretary and the Housing and Home Financing Administrator for projects in urbanized areas, and the language relied on by Plaintiffs is merely repetitive of the statutory command. The Court is therefore of the opinion that Executive Order 11237 is not applicable to this case.

5. Summary.

Upon a review of all the evidence introduced at the hearing, the Court finds that no acceptable interpretations were offered by the Bureau to explain the discrepancies between its conduct in approving the Mustang Island application and transferring federal funds and the plain terms of the above-cited departmental and bureau regulations. The Bureau's approval of the project must therefore be set aside until compliance with these regulations occurs.

D. State Law Issues.

Because of the disposition made of the federal issues in this case, it is unnecessary to proceed to the various issues of state law presented by the complaint, and this Court expressly declines to rule upon them. However, in the opinion

of this Court, the evidence at the hearing is sufficient to fully substantiate plaintiffs' contentions that the application for BOR funds submitted by Commissioners Jersig and Gilvin and the contracts of sale with Mrs. Wilson were not official acts of the Parks and Wildlife Commission, and that implementation of this project would virtually eliminate state funding for acquisition and development of outdoor recreational resources through 1975.

CONCLUSION

This opinion shall constitute the court's findings of fact and conclusions of law in accordance with Rule 52, Federal Rules of Civil Procedure. Plaintiffs have shown themselves clearly entitled to the injunctive relief set out in the order accompanying this opinion.

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[1] "The Congress finds and declares it to be desirable that all American people of present and future generations be assured adequate outdoor recreation resources, and that it is desirable for all levels of government and private interests to take prompt and coordinated action to the extent practicable without diminishing or affecting their respective powers and functions to conserve, develop and utilize such resources for the benefit and enjoyment of the American people." 16 U.S.C. § 4601.

[2] "The purposes of Sections 460(1)-4 to 460(1)-11 of this Title are to assist in preserving, developing, and assuring accessibility to all citizens of the United States of America of present and future generations and visitors who are lawfully present within the boundaries of the United States of America such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States by (1) providing funds for and authorizing Federal assistance to the States in planning, acquisition, and development of needed land and waters areas and facilities and (2) providing funds for the Federal acquisition and development of certain lands and other areas." 16 U.S.C. § 4601-4.

ORDER

For the reasons set out in the Memorandum Opinion accompanying this Order, it is accordingly

ORDERED, ADJUDGED and DECREED that the approval of federal funds for the acquisition by the State of Texas of approximately 3,965 acres of land on Mustang Island owned by Mrs. Sam Wilson, Jr. and others, heretofore given by the Secretary of the Interior or his lawful delegees in the Bureau of Outdoor Recreation pursuant to the Land and Water Conservation Act, be, and is hereby, SET ASIDE.

It is further ORDERED, ADJUDGED and DECREED that the below-named persons be, and are hereby ENJOINED as follows:

(1) The Secretary of the Interior, and any and all of his delegees within the Bureau of Outdoor Recreation are prohibited from granting any federal assistance under the Land and Water Conservation Act to the State of Texas for the purpose of acquiring lands on Mustang Island, owned by Mrs. Sam Wilson, Jr. and others, pursuant to the application for federal funds made the subject of this suit;

(2) J. R. Singleton, Robert G. Mauermann, Harry D. Jersig and L. P. Gilvin are prohibited from accepting or negotiating any check or warrant, or disposing of any cash, that may have come into their hands, or that may in the future come into their hands, from the federal government by virtue of the proposed purchase by the State of Texas of land on Mustang Island, owned by Mrs. Sam Wilson, Jr. and others, pursuant to the application for federal funds made the subject of this suit;

(3) Mrs. Sam Wilson, Jr., Mr. Robert S. Calvert, Texas Comptroller of Public Accounts, and Jesse James, Texas State Treasurer, are prohibited from accepting or negotiating any check or warrant or disposing of any cash that may have come into their hands, or that may in the future come into their hands, from the federal government by virtue of the proposed purchase by the State of Texas of land on Mustang Island, owned by Mrs. Sam Wilson, Jr. and others, pursuant to the application for federal funds made the subject of this suit.

No provision of this Order shall preclude the State of Texas or its duly appointed officials from again applying to the Secretary of the Interior or his delegees within the Bureau of Outdoor Recreation for financial assistance in connection with the purchase of land on Mustang Island owned by Mrs. Sam Wilson, Jr. or any other person, nor shall any provision of this Order preclude the Secretary or his delegees from responding to any such application in accordance with the Land and Water Conservation Act and the applicable provisions of then-current bureau and departmental regulations. This Order is effective only in respect to the facts shown by the evidence adduced in this case.

ENTERED this the 12th day of February, 1971, at Austin, Texas.

/s/ JACK ROBERTS
United States District Judge

APPENDIX E

LAND AND WATER CONSERVATION FUND ACT OF 1965

16 U.S.C. § 460*l*—4. Land and water conservation provisions; statement of purposes

The purposes of sections 460*l*—4 to 460*l*—11 of this title are to assist in preserving, developing, and assuring accessibility to all citizens of the United States of America of present and future generations and visitors who are lawfully present within the boundaries of the United States of America such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States by (1) providing funds for and authorizing Federal assistance to the States in planning, acquisition, and development of needed land and waters areas and facilities and (2) providing funds for the Federal acquisition and development of certain lands and other areas. Pub.L. 88-578, § 1(b), Sept. 3, 1964, 78 Stat. 897.

16 U.S.C. § 460*l*—5. Land and water conservation funds; establishment; covering certain revenues and collections into fund

During the period ending June 30, 1989, and during such additional period as may be required to repay any advances made pursuant to section 460*l*-7(b) of this title, there shall be covered into the land and water conservation fund in the Treasury of the United States, which fund is hereby established and is hereinafter referred to as the "fund", the following revenues and collections:

Entrance and user fees; establishment; regulations

(a) All proceeds from entrance, admission, and other recreation user fees or charges collected or received by the National Park Service, the Bureau of Land Management, the Bureau of Sport Fisheries and Wildlife, the Bureau of Reclamation, the Forest Service, the Corps of Engineers, the Tennessee Valley Authority, and the United States section of the International Boundary and Water Commission (United States and Mexico), notwithstanding any other provision of law: *Provided,* That nothing in sections 460*l*—4 to 460*l*—11 of this title shall affect any rights or authority of the States with respect to fish and wildlife, nor shall sections 460*l*—4 to 460*l*—11 of this title repeal any provision of law that permits States or political subdivisions to share in the revenues from Federal lands or affect any contract heretofore entered into by the United States that provides that such revenues collected at particular Federal areas shall be credited to specific purposes; but the proceeds from fees or charges established by the President pursuant to this subsection for entrance or admission generally to Federal areas shall be used solely for the purposes of sections 460*l*—4 to 460*l*—11 of this title.

The President is authorized, to the extent and within the limits hereinafter set forth, to designate or provide for the designation of land or water areas administered by or under the authority of the Federal agencies listed in the preceding paragraph at which entrance, admission, and other forms of recreation user fees shall be charged and to establish and revise or provide for the establishment and revision of such fees as follows:

(i) An annual fee of not more than $10 payable by a person entering an area so designated by private noncommercial automobile which, if paid, shall excuse the person paying the same and anyone who accom-

panies him in such automobile from payment of any other fee for admission to that area and other areas administered by or under the authority of such agencies, except areas which are designated by the President as not being within the coverage of the fee, during the year for which the fee has been paid.

(ii) Fees for a single visit or a series of visits during a specified period of less than a year to an area so designated payable by persons who choose not to pay an annual fee under clause (i) of this paragraph or who enter such an area by means other than private noncommercial automobile.

(iii) Fees payable for admission to areas not within the coverage of a fee paid under clause (i) of this paragraph.

(iv) Fees for the use within an area of sites, facilities, equipment, or services provided by the United States.

Entrance and admission fees may be charged at areas administered primarily for scenic, scientific, historical, cultural, or recreational purposes. No entrance or admission fee shall be charged except at such areas or portions thereof administered by a Federal agency where recreation facilities or services are provided at Federal expense. No fee of any kind shall be charged by a Federal agency under any provision of sections 460*l* — 4 to 460*l* — 11 of this title for use of any waters. All fees established pursuant to this subsection shall be fair and equitable, taking into consideration direct and indirect cost to the Government, benefits to the recipient, public policy or interest served, and other pertinent factors. Nothing contained in this paragraph shall authorize Federal hunting or fishing licenses or fees or charges for commercial or other activities not related to recreation. No such fee shall be charged for travel by private noncommercial vehicle over any national parkway or

any road or highway established as a part of the national Federal-aid system, as defined in section 101, title 23, or any road within the National Forest system or a public land area, which, though it is part of a larger area, is commonly used by the public as a means of travel between two places either or both of which are outside the area. No such fee shall be charged any person for travel by private noncommercial vehicle over any road or highway to any land in which such person has any property right if such land is within any such designated area.

No fees established under clause (ii) or clause (iii) of the second paragraph of this subsection shall become effective with respect to any area which embraces lands more than half of which have heretofore been acquired by contribution from the government of the State in which the areas is located until sixty days after the officer of the United States who is charged with responsibility for establishing such fees has advised the Governor of the affected State, or an agency of the State designated by the Governor for this purpose, of his intention so to do, and said officer shall, before finally establishing such fees, give consideration to any recommendation that the Governor or his designee may make with respect thereto within said sixty days and to all obligations, legal or otherwise, that the United States may owe to the State concerned and to its citizens with respect to the area in question. In the Smoky Mountains National Park, unless fees are charged for entrance into said park on main highways and thoroughfares, fees shall not be changed for entrance on other routes into said park or any part thereof.

There is hereby repealed the third paragraph from the end of the division entitled "National Park Service" of section 1 of the Act of March 7, 1928 (45 Stat. 238) and the second paragraph from the end of the division entitled

"National Park Service" of section 1 of the Act of March 4, 1929 (45 Stat. 1602; section 14 of this title). Section 4 of the Act entitled "An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes", approved December 24, 1944 (section 460d of this title), as amended by the Flood Control Act of 1962 (76 Stat. 1195) is further amended by deleting ", without charge," in the third sentence from the end thereof. All other provisions of law that prohibit the collection of entrance, admission, or other recreation user fees or charges authorized by sections 460*l*—4 to 460*l*—11 of this title or that restrict the expenditure of funds if such fees or charges are collected are hereby also repealed: *Provided,* That no provision of any law or treaty which extends to any person or class of persons a right of free access to the shoreline of any reservoir or other body of water, or to hunting and fishing along or on such shoreline, shall be affected by this repealer.

The heads of departments and agencies are authorized to prescribe rules and regulations for the collection of any entrance, admission, and other recreation user fees or charges established pursuant to this subsection for areas under their administration: *Provided further,* That no free passes shall be issued to any Member of Congress or other government official. Clear notice that a fee or charge has been established shall be posted at each area to which it is applicable. Any violation of any rules or regulations promulgated under sections 460*l*—4 to 460*l*—10 of this title at an area so posted shall be punishable by a fine of not more than $100. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States commissioner specially designated for that purpose by the court by which he was appointed in the same manner and subject to the same conditions as pro-

vided for in Title 18, section 3401, subsections (b), (c), (d), and (e), as amended.

Surplus property sales

(b) All proceeds (except so much thereof as may be otherwise obligated, credited, or paid under authority of those provisions of law set forth in section 485(b)-(e), Title 40, or the Independent Offices Appropriation Act 1963 (76 Stat. 725) or in any later appropriation Act) hereafter received from any disposal of surplus real property and related personal property under the Federal Property and Administrative Services Act of 1949, as amended, notwithstanding any provision of law that such proceeds shall be credited to miscellaneous receipts of the Treasury. Nothing in sections 460*l*—4 to 460*l*—11 of this title shall affect existing laws or regulations concerning disposal of real or personal surplus property to schools, hospitals, and States and their political subdivisions.

Motorboat fuels tax

(c) The amounts provided for in section 460*l*—11 of this title. Pub.L. 88-578, § 2, Sept. 3, 1964, 78 Stat. 897, amended Pub. L. 89-72, § 11, July 9, 1965, 79 Stat. 218; Pub.L. 90-401, §§ 1(a), 2, July 15, 1968, 82 Stat. 354, 355; Pub.L. 91-308, § 2, July 7, 1970, 84 Stat. 410.

16 U.S.C. § 460*l*—6. Appropriations for expenditure of land and water conservation fund moneys; transfers to miscellaneous receipts of the Treasury

Moneys covered into the fund shall be available for expenditure for the purposes of sections 460*l*—4 to 460*l*—11 of this title only when appropriated therefor. Such appropriations may be made without fiscal-year limitation.

Moneys covered into this fund not subsequently authorized by the Congress for expenditures within two fiscal years following the fiscal year in which such moneys had been credited to the fund, shall be transferred to miscellaneous receipts of the Treasury. Pub.L. 88-578, § 3, Sept. 3, 1964, 78 Stat. 899.

16 U.S.C. § 460*l*—7. Appropriations for expenditure of land and water conservation fund moneys — Estimates of financial requirements; allocation of fund for State and Federal purposes; executive variation of percentages for meeting current State and Federal needs

(a) There shall be submitted with the annual budget of the United States a comprehensive statement of estimated requirements during the ensuing fiscal year for appropriations from the fund. In the absence of a provision to the contrary in the Act making an appropriation from the fund (i) the appropriation therein made shall be available in the ratio of 60 per centum for State purposes and 40 per centum for Federal purposes, but (ii) the President may, during the first five years in which appropriations are made from the fund, vary said percentages by not more than 15 points either way to meet, as nearly as may be, the current relative needs of the States and the Federal Government.

Authorization for advance appropriations; fiscal year limitations; availability for State and Federal purposes; allocation ratio; repayment without interest; annual transfers of fund revenues to general fund of the Treasury; subsequent credits to miscellaneous receipts; continued appropriation and allocation of fund moneys not required for repayment purposes

(b) Beginning with the third full fiscal year in which the fund is in operation, and until the end of fiscal year

1969, advance appropriations are hereby authorized to be made to the fund from any moneys in the Treasury not otherwise appropriated in such amounts as to average not more than $60,000,000 for each fiscal year. Such advance appropriations shall be available for Federal and State purposes in the same manner and proportions as other moneys appropriated from the fund. Such advance appropriations shall be repaid without interest, beginning at the end of the next fiscal year after the first ten full fiscal years in which the fund has been in operation, by transferring, annually until fully repaid, to the general fund of the Treasury 50 per centum of the revenues received by the land and water conservation fund each year under section 460*l*—5 of this title prior to July 1, 1989, and 100 per centum of any revenues thereafter received by the fund. Revenues received from the sources specified in section 460*l*—5 of this title after July 1, 1989, or after payment has been completed as provided by this subsection, whichever occurs later, shall be credited to miscellaneous receipts of the Treasury. The moneys in the fund that are not required for repayment purposes may continue to be appropriated and allocated in accordance with the procedures prescribed by sections 460*l*—4 to 460*l*—11 of this title.

16 U.S.C. § 460*l*—8. Financial assistance to States—Authority of Secretary of Interior; payments to carry out purposes of land and water conservation provisions

(a) The Secretary of the Interior (hereinafter referred to as the "Secretary") is authorized to provide financial assistance to the States from moneys available for State purposes. Payments may be made to the States by the Secretary as hereafter provided, subject to such terms and conditions as he considers appropriate and in the public interest to carry out the purposes of sections 460*l*—4 to

460*l*—11 of this title, for outdoor recreation: (1) planning, (2) acquisition of land, waters, or interests in land or waters, or (3) development.

Apportionment among States; finality of administrative determination; formula; notification; reapportionment of unobligated amounts; definition of State

(b) Sums appropriated and available for State purposes for each fiscal year shall be apportioned among the several States by the Secretary, whose determination shall be final, in accordance with the following formula:

(1) two-fifths shall be apportioned equally among the several States; and

(2) three-fifths shall be apportioned on the basis of need to individual States by the Secretary in such amounts as in his judgment will best accomplish the purposes of sections 460*l*—4 to 460*l*—11 of this title. The determination of need shall include among other things a consideration of the proportion which the population of each State bears to the total population of the United States and of the use of outdoor recreation resources of individual States by persons from outside the State as well as a consideration of the Federal resources and programs in the particular States.

The total allocation to an individual State under paragraphs (1) and (2) of this subsection shall not exceed 7 per centum of the total amount allocated to the several States in any one year.

The Secretary shall notify each State of its apportionments; and the amounts thereof shall be available thereafter for payment to such State for planning, acquisition, or development projects as hereafter prescribed. Any

amount of any apportionment that has not been paid or obligated by the Secretary during the fiscal year in which such notification is given and for two fiscal years thereafter shall be reapportioned by the Secretary in accordance with paragraph (2) of this subsection.

The District of Columbia, Puerto Rico, the Virgin Islands, Guam, and American Samoa shall be treated as States for the purposes of sections 460*l*—4 to 460*l*—10 of this title, except for the purpose of paragraph (1) of this subsection. Their population also shall be included as a part of the total population in computing the apportionment under paragraph (2) of this subsection.

Matching requirements

(c) Payments to any State shall cover not more than 50 per centum of the cost of planning, acquisition, or development projects that are undertaken by the State. The remaining share of the cost shall be borne by the State in a manner and with such funds or services as shall be satisfactory to the Secretary. No payment may be made to any State for or on account of any cost or obligation incurred or any service rendered prior to September 3, 1964.

Comprehensive State plan; necessity; adequacy; contents; correlation with other plans; factors for formulation of Housing and Home Finance Agency financed plans; planning projects

(d) A comprehensive statewide outdoor recreation plan shall be required prior to the consideration by the Secretary of financial assistance for acquisition or development projects. The plan shall be adequate if, in the judgment of the Secretary, it encompasses and will promote the purposes of sections 460*l*—4 to 460*l*—11 of this title. The plan shall contain —

(1) the name of the State agency that will have authority to represent and act for the State in dealing with the Secretary for purposes of sections 460*l*—4 to 460*l*—11 of this title;

(2) an evaluation of the demand for and supply of outdoor recreation resources and facilities in the State;

(3) a program for the implementation of the plan; and

(4) other necessary information, as may be determined by the Secretary.

The plan shall take into account relevant Federal resources and programs and shall be correlated so far as practicable with other State, regional, and local plans. Where there exists or is in preparation for any particular State a comprehensive plan financed in part with funds supplied by the Housing and Home Finance Agency, any statewide outdoor recreation plan prepared for purposes of sections 460*l*—4 to 460*l*—11 of this title shall be based upon the same population, growth, and other pertinent factors as are used in formulating the Housing and Home Finance Agency financed plans.

The Secretary may provide financial assistance to any State for projects for the preparation of a comprehensive statewide outdoor recreation plan when such plan is not otherwise available or for the maintenance of such plan.

Projects for land and water acquisition; development

(e) In addition to assistance for planning projects, the Secretary may provide financial assistance to any State for the following types of projects or combinations thereof if they are in accordance with the State comprehensive plan:

(1) For the acquisition of land, waters, or interests in land or waters (other than land, waters, or interests in land or waters acquired from the United States for less than fair market value), but not including incidental costs relating to acquisition.

(2) For development, including but not limited to site planning and the development of Federal lands under lease to States for terms of twenty-five years or more.

Requirements for project approval; conditions; progress payments; payments to Governors or State officials or agencies; State transfer of funds to public agencies; conversion of property to other uses; reports to Secretary; accounting; records; audit

(f) Payments may be made to States by the Secretary only for those planning, acquisition, or development projects that are approved by him. No payment may be made by the Secretary for or on account of any project with respect to which financial assistance has been given or promised under any other Federal program or activity, and no financial assistance may be given under any other Federal program or activity for or on account of any project with respect to which such assistance has been given or promised under sections 460*l*—4 to 460*l*—11 of this title. The Secretary may make payments from time to time in keeping with the rate of progress toward the satisfactory completion of individual projects: *Provided,* That the approval of all projects and all payments, or any commitments relating thereto, shall be withheld until the Secretary receives appropriate written assurance from the State that the State has the ability and intention to finance its share of the cost of the particular project, and to operate and maintain by acceptable standards, at State expense, the particular properties or facilities acquired or developed for public outdoor recreation use.

Payments for all projects shall be made by the Secretary to the Governor of the State or to a State official or agency designated by the Governor or by State law having authority and responsibility to accept and to administer funds paid hereunder for approved projects. If consistent with an approved project, funds may be transferred by the State to a political subdivision or other appropriate public agency.

No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

No payment shall be made to any State until the State has agreed to (1) provide such reports to the Secretary, in such form and containing such information, as may be reasonably necessary to enable the Secretary to perform his duties under sections 460*l*—4 to 460*l*—11 of this title, and (2) provide such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement and accounting for Federal funds paid to the State under sections 460*l*—4 to 460*l*—11 of this title.

Each recipient of assistance under sections 460*l*—4 to 460*l*—11 of this title shall keep such records as the Secretary of the Interior shall prescribe, including records which fully disclose the amount and the disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the costs of the project or undertaking sup-

plied by other sources, and such other records as will facilitate an effective audit.

The Secretary of the Interior, and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipient that are pertinent to assistance received under sections 460*l*—4 to 460*l*—11 of this title.

Coordination with Federal agencies

(g) In order to assure consistency in policies and actions under sections 460*l*—4 to 460*l*—11 of this title, with other related Federal programs and activities (including those conducted pursuant to sections 1500-1500e of Title 42 and section 461 of Title 41) and to assure coordination of the planning, acquisition, and development assistance to States under this section with other related Federal programs and activities, the President may issue such regulations with respect thereto as he deems desirable and such assistance may be provided only in accordance with such regulations. Pub.L. 88-578, § 5, Sept. 3, 1964, 78 Stat. 900.

16 U.S.C. § 460*l*—9. Allocation of land and water conservation fund moneys for Federal purposes; payment into miscellaneous receipts of the Treasury as partial offset against capital costs of certain Federal water development projects; acquisition restriction

(a) Moneys appropriated from the fund for Federal purposes shall, unless otherwise allotted in the appropriation Act making them available, be allotted by the President to the following purposes and subpurposes:

(1) For the acquisition of land, waters, or interests in land or waters as follows:

National park system; recreation areas.—Within the exterior boundaries of areas of the national park system now or hereafter authorized or established and of areas now or hereafter authorized to be administered by the Secretary of the Interior for outdoor recreation purposes.

National Forest System.—Inholdings within (a) wilderness areas of the National Forest System, and (b) other areas of national forests as the boundaries of those forests exist on January 1, 1965 which other areas are primarily of value for outdoor recreation purposes: *Provided,* That lands outside of but adjacent to an existing national forest boundary, not to exceed five hundred acres in the case of any one forest, which would comprise an integral part of a forest recreational management area may also be acquired with moneys appropriated from this fund: *Provided further,* That not more than 15 per centum of the acreage added to the National Forest System pursuant to this section shall be west of the 100th meridian.

Threatened species.—For any national area which may be authorized for the preservation of species of fish or wildlife that are threatened with extinction.

Recreation at refuges.—For the incidental recreation purposes of section 460k—1 of this title; and

(2) For payment into miscellaneous receipts of the Treasury as a partial offset for those capital costs, if any, of Federal water development projects hereafter authorized to be constructed by or pursuant to an Act of Congress which are allocated to public recreation and the enhancement of fish and wildlife values and financed through appropriations to water resource agencies.

(b) Appropriations from the fund pursuant to this section shall not be used for acquisition unless such acquisition is otherwise authorized by law. Pub.L. 88-578, § 6, Sept. 3,

1964, 78 Stat. 903, amended Pub.L. 90-401, § 1(c), July 15, 1968, 82 Stat. 355.

16 U.S.C. § 460*l*—10. Availability of land and water conservation fund for publicity purposes

Moneys derived from the sources listed in section 460*l*—5 of this title shall not be available for publicity purposes. Pub.L. 88-578, § 7, Sept. 3, 1964, 78 Stat. 903.

16 U.S.C. § 460*l*—10a. Contracts for acquisition of lands and waters

Not to exceed $30,000,000 of the money authorized to be appropriated from the fund by section 460*l*—6 of this title may be obligated by contract during each fiscal year for the acquisition of lands, waters, or interests therein within areas specified in section 460*l*—9 (a) (1) of this title. Any such contract may be executed by the head of the department concerned, within limitations prescribed by the Secretary of the Interior. Any such contract so entered into shall be deemed a contractual obligation of the United States and shall be liquidated with money appropriated from the fund specifically for liquidation of such contract obligation. No contract may be entered into for the acquisition of property pursuant to this section unless such acquisition is otherwise authorized by Federal law.

Pub.L. 88-578, § 8, as added Pub.L. 90-401, § 4, July 15, 1968, 82 Stat. 355, and amended Pub.L. 91-308, § 3, July 7, 1970, 84 Stat. 410.

16 U.S.C. § 460*l*—10b. Contracts for options to acquire lands and waters in national park system

The Secretary of the Interior may enter into contracts for options to acquire lands, waters, or interests therein within the exterior boundaries of any area the acquisition

of which is authorized by law for inclusion in the national park system. The minimum period of any such option shall be two years, and any sums expended for the purchase thereof shall be credited to the purchase price of said area. Not to exceed $500,000 of the sum authorized to be appropriated from the fund by section 460*l*—6 of this title may be expended by the Secretary in any one fiscal year for such options.

Pub.L. 88-578, § 9, as added Pub.L. 90-401 § 4, July 15, 1968, 82 Stat. 355.

16 U.S.C. § 460*l*—10c. Repeal of provisions prohibiting collection of recreation fees or user charges

There is hereby repealed the third paragraph from the end of the division entitled "National Park Service" of section 1 of the Act of March 7, 1928 (45 Stat. 238) and the second paragraph from the end of the division entitled "National Park Service" of section 1 of the Act of March 4, 1929 (45 Stat. 1602; section 14 of this title). Section 4 of the Act entitled "An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes", approved December 24, 1944 (section 460d of this title), as amended by the Flood Control Act of 1962 (76 Stat. 1195) is further amended by deleting ", without charge," in the third sentence from the end thereof. All other provisions of law that prohibit the collection of entrance, admission, or other recreation user fees or charges authorized by sections 460*l* —4 to 460*l*—11 of this title or that restrict the expenditure of funds if such fees or charges are collected are hereby also repealed: *Provided,* That no provision of any law or treaty which extends to any person or class of persons a right of free access to the shoreline of any reservoir or other body of water, or to hunting and fishing along or on such shoreline, shall be affected by this repealer.

Pub.L. 88-578, § 10, as added Pub.L. 90-401, § 1(a), July 15, 1968, 82 Stat. 354.

16 U.S.C. § 460*l*—11. Transfers to and from land and water conservation fund—Motorboat fuel taxes from Highway Trust Fund into conservation fund

(a) There shall be set aside in the land and water conservation fund in the Treasury of the United States provided for in sections 460*l*—4 to 460*l*—10 of this title the amounts specified in section 209(f) (5) of the Highway Revenue Act of 1956 (relating to special motor fuels and gasoline used in motorboats).

Refunds of gasoline taxes for certain nonhighway purposes or used by local transit systems and motorboat fuel taxes from conservation fund into general fund of the Treasury

(b) There shall be paid from time to time from the land and water conservation fund into the general fund of the Treasury amounts estimated by the Secretary of the Treasury as equivalent to —

(1) the amounts paid before July 1, 1978, under section 6421 of Title 26 (relating to amounts paid in respect of gasoline used for certain nonhighway purposes or by local transit systems) with respect to gasoline used after December 31, 1964, in motorboats, on the basis of claims filed for periods ending before October 1, 1977; and

(2) 80 percent of the floor stocks refunds made before July 1, 1978, under section 6412(a) (2) of Title 26 with respect to gasoline to be used in motorboats.

Pub.L. 88-578, Title II, § 201, Sept. 3, 1964, 78 Stat. 904, amended Pub.L. 91-605, Title III, § 302, Dec. 31, 1970, 84 Stat. 1743.

APPENDIX F

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that —

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter —

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include —

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

5 U.S.C. § 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

5 U.S.C. § 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld ~~or unreasonably delayed~~; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or other-

wise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

APPENDIX G

In The

United States District Court

For the Western District of Texas
Austin Division

Civil Docket
No. A-70-CA-136

Pearce Johnson, Ben Atwell, Don Kennard, Peyton Walters, And All Texas Citizens For Orderly Development Of Texas Park And Recreational Facilities

Plaintiffs

v.

Fred Russell, Acting United States Secretary Of The Interior, And The United States Department Of The Interior; J. R. Singleton, Individually And As Executive Director Of The Texas Parks And Wildlife Department; Robert G. Mauermann, Individually And As Deputy Director Of The Texas Parks And Wildlife Department; Charles W. Croslin, Individually And As Administrative Assistant, Texas Parks And Wildlife Department; Harry D. Jersig, Individually And As A Member Of The Texas Parks And Wildlife Commission; L. P. Gilvin, Individually And As A Member Of The Texas Parks And Wildlife Commission; Robert S. Calvert, Individually And As Texas Comptroller Of Public Accounts; Jesse James, Individually And As Treasurer Of The State Of Texas, And Mrs. Sam Wilson

Defendants

FIRST AMENDED COMPLAINT

1.

(a) Pearce Johnson brings this suit in four capacities: as Chairman of the Texas Parks and Wildlife Commission; as the duly appointed State Liaison Officer; as a concerned individual; and as a representative of the class to be described below.

(b) Ben Atwell is a duly elected State Representative from Dallas County, Texas. Don Kennard is a duly elected State Senator from Tarrant County, Texas. Peyton Walters is the duly elected Judge of Polk County, Texas. All three of these Plaintiffs bring this suit as concerned individuals and as representatives of the class to be described below.

(c) This action is also brought as a class action under Rule 23, F.R.C.P. by the above on behalf of all Texas citizens who are for the orderly development of Texas Parks and Recreational Facilities in accordance with the State Comprehensive Outdoor Recreational Plan.

2.

(a) Fred Russell is the Acting United States Secretary of the Interior and may be served at the offices of the Department of the Interior in Washington, D.C. The Department of the Interior may be served at the same address.

(b) J. R. Singleton may be served individually and in his official capacity either at his office in the Reagan Building in Austin, Texas, or at his home address of 3805 Hyridge, Austin, Texas.

(c) Robert G. Mauermann may be served individually and in his official capacity at his office in the Reagan Build-

ing, Austin, Texas, or at his home address at 3910 Hyridge, Austin, Texas.

(d) Charles W. Croslin may be served individually and in his official capacity at his office in the Reagan Building in Austin, Texas, and the Texas Parks and Wildlife Department may also be served at its offices at the same address.

(e) Harry D. Jersig may be served individually and in his official capacity at 600 Lone Star Boulevard, San Antonio, Texas.

(f) L. P. Gilvin may be served individually and in his official capacity at 3217 Crockett Street, Amarillo, Texas.

(g) Robert S. Calvert may be served individually and in his official capacity at his office in the Texas Capitol Building, Austin, Texas.

(h) Jesse James may be served individually and in his individual capacity at his office in the Texas Capitol Building, Austin, Texas.

(i) Mrs. Sam Wilson may be served at either her home in Corpus Christi, Texas, or her home on Park Avenue, New York City, New York.

3.

Jurisdiction of this court is invoked pursuant to 28 U.S.C., § 1331, 28 U.S.C., § 1361, and 5 U.S.C., 701 through 5, U.S.C. 706.

4.

This case arises because of a violation by the Secretary of the Interior and personnel of his office of both 16 U.S.C. 460 1-8 and the regulations promulgated thereunder by the President of the United States by Executive Order No. 11237 dated July 27, 1965, 30 F.R. 9433; and a violation of the policies and procedures of the Bureau of Outdoor

Recreation Manual promulgated by the Secretary of the Interior (excerpts of which are attached as Appendix "A" hereto); and a violation of the procedures set forth in Bureau of the Budget Circular No. 845;

and;

Because of a violation by the Defendants Gilvin, Jersig and Singleton of Article 978f-3a, Section 6, Texas Penal Code and Art. 6081r, V.A.C.S. which require said Defendants to comply with the requirements of federal law above set out;

and;

Because of violation of the following requirements of State law:

(a) Violation of Article III, § 51 of the Constitution of Texas, which prohibits the paying of more than fair market value for land proposed to be acquired;

(b) Violation of the terms of the only request for federal funds authorized by action of the Texas Parks and Wildlife Commission.

(c) H. B. No. 2, Second Called Session, Sixty-first Texas Legislature, 1969, Article III, Page 122, General Appropriations Bill (Appendix "B" to the complaint) which requires the prior written approval of the Governor for expenditure of funds.

(d) Art. IV, § 10 of the Texas Constitution and Art. 5240, V.A.C.S. which require the Governor's signature to validate any business with the United States.

5.

The facts pertinent to this action are as follows:

(a) The State of Texas, pursuant to Article 6081r, Tex. Civ. Stat. and 16 U.S.C. 460 1-8, has formulated and adopt-

ed a State Comprehensive Outdoor Recreation Plan (SCORP, hereinafter referred to as "the plan") which has been approved by the Secretary of the Interior.

(b) "The plan" contains priorities for the acquisition of lands for park and recreational purposes and in particular contains a study of park and recreational requirements along the Texas Gulf Coast. Six areas of need are listed along with the priority to be given to the acquisition of each of the six areas. The areas, listed in order of priority are:

(1) Freeport area (Brazoria and Matagorda Counties)

(2) Galveston Island, Southern End

(3) Upper Coast (Jefferson and Chambers Counties)

(4) Brazos Island east of Brownsville (lower coast)

(5) Matagorda Island

(6) Matagorda County.

These areas are shown on Appendix "C" to this complaint.

(c) "The plan" contains no priority for the acquisition and development of any other area of the Texas Gulf Coast, including Corpus Christi and Mustang Island.

(d) Defendants Jersig, Gilvin, and Singleton have determined to purchase with 50% state funds and 50% federal funds, a large portion of Mustang Island, which lies on the Gulf Coast opposite the City of Corpus Christi, Texas, and which is not of any priority in "the plan", and have made application to the Department of the Interior for federal funds for 50% of the cost of acquisition.

(e) In spite of the fact that the application is not in accordance with "the plan" the Department of the Interior has approved the request for funds.

(f) The purchase of Mustang Island violates "the plan" and takes from the Parks and Wildlife Department for a minimum period of five (5) years all funds which could be used to acquire land in the furtherance of the priorities of "the plan".

6.

16 U.S.C. 460 1-8 permits the Secretary of the Interior to provide financial assistance to the State for projects, "if they are in accordance with the state comprehensive plan." (16 U.S.C. 460 1-8(e)).

Executive Order No. 11237, July 27, 1965, 30 F.R. 9433, Section 3, issued by President Johnson, provides:

> "Grants made by the Secretary for the acquisition of land in urbanized areas and other urban places for outdoor recreation under the Conservation Act shall be for projects which:
>
> (1) are consistent with the comprehensive statewide outdoor recreation plan for the State or State in which the project is to be located: . . . . ."

That the Secretary may approve only those projects which comply with "the plan" is demonstrated by 16 U.S.C. 460 1-8(f) where in speaking of conversion of property from outdoor recreational use to other use, "the Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan. . ." and by the Bureau of Outdoor Recreation Manual, (excerpts attached as Appendix "D" to the complaint), Sheet 1, where the following appears:

> "3 *Relation to State Plan.* Only project proposals in accord with a State Plan found by the Bureau to be adequate for purposes of the Act may be considered."

The purchase of Mustang Island is not in accordance with "the plan" and its purchase, if permitted, renders the

plan meaningless. Mustang Island has nothing to recommend it under the plan different from other lands on the Gulf Coast not included in the priorities of "the plan". The question presented is thus very elementary. Is the plan to be meaningless, or is it to be a meaningful plan for the orderly development of the recreation needs of the people? Congress intended the latter; the State Legislature intended the latter; and therefore, the Plaintiffs are entitled to relief in this suit. The Secretary of the Interior and Defendants Jersig, Gilvin and Singleton have clearly violated the law.

7.

Although Plaintiff Johnson is the duly appointed State Liaison Officer and is the person charged with responsibility for initiating requests to the Department of the Interior (See Appendix "E", hereto, letter of December 2, 1970, from Underhill, Assistant Director of State Grants and Resource Studies, Department of the Interior, to Merrill; Appendix "D", excerpts from Bureau of Outdoor Recreation Manual; and Appendix "F", a letter from Singleton to Johnson dated July 28, 1970), and although State Liaison Officer Johnson did not request the federal funds and has in fact in accordance with the Bureau of Outdoor Recreation Manual, Part 660, Sheet 2, of February 14, 1970, done all within his power to withdraw the request made (See Appendix "G", letter December 10, 1970, Johnson to Arnold), the Secretary has approved the federal funding. The Bureau of Outdoor Recreation Manual, Part 660 (Appendix "D") Sheet of February 14, 1970 provides:

> ".3 *Withdrawal on Changes in Project Proposed.* Prior to approval, a project proposal may be altered or withdrawn by a letter from the SLO to the Regional Office. . . ."

Plaintiffs are not certain what date the approval of funding was given but are certain that it was well after the

letter of State Liaison Officer Johnson withdrawing the unauthorized and illegal request for funds. Said letter remains unanswered to this date. The Governor of Texas joined in this request (letter, Appendix "H") and his letter, too, remains unanswered.

8.

The only action of the Texas Parks and Wildlife Commission authorizing acquisition of and a request for funding of a Mustang Island tract was taken in executive session of November 10, 1970. The only authorization given (excluding availability of contingency fund money which was not even ultimately applied for) was for an application of funding for 50% federal money for a total purchase of approximately 2,000 acres, to be based on an actual survey at $1,100.00 per acre, or federal funds of approximately $1,100,000.00. The request made to the Bureau of Outdoor Recreation was for 50% funding of a purchase of 3,965 acres, not based on actual survey, at a price of $1,100.00 per acre or a total request for federal funds of $2,181,125.00. This is far in excess of the authorization attempted by the majority of the Commission and it in fact ignores the previous commitment of the Commission recognized and affirmed at the session of November 10, 1970, to purchase and develop land for a park on Lake Livingston in Polk County, Texas. The application, by virtue of the fact that the State Commission has thereby attempted to commit *all* available funds to Mustang Island, kills the Lake Livingston project, because the additional funds required for the Lake Livingston project would not be available to pursue this project and would put the State Parks and Wildlife Department in deficit on its bond funds by $720,323.50, and in deficit on available federal assistance funds in the amount of $1,065,583.95. This request further halts all development on existing parks because the only funds budgeted are for

"first phase" development, and many additional developments are needed to place these parks in a condition that will permit the public to utilize them to their fullest.

The request made is illegal because not authorized by the Texas Parks and Wildlife Commission and this illegality, because of lack of proper action of the Parks and Wildlife Commission, is recognized by the Department of the Interior's own attorneys. (See memo of Office of Solicitor, Department of the Interior, Appendix "I").

9.

The undersigned affiant, Pearce Johnson, has reason to believe and does believe that on December 29, 1970, a representative of the Defendants Jersig, Gilvin and Singleton went to the Department of Interior in Washington, D.C. to receive a U.S. Treasury Warrant, and that said representative then proceeded to New York to obtain the signature of the proposed seller, Mrs. Sam Wilson, to a state purchase voucher for the full amount of the Mustang Island purchase; then returned to Austin, Texas, with such voucher and warrant and deposited said warrant with the State Comptroller of Public Accounts and State Treasurer to be immediately processed through both said offices and paid out to Mrs. Sam Wilson in conjunction with matching State funds which are proposed to be acquired by the following precipitous actions.

On December 28, 1970, at approximately 4:00 p.m., Mr. Charles W. Croslin, Administrative Assistant, was ordered by the Deputy Director of the Parks and Wildlife Department to take bids and sell a sufficient number of U.S. Treasury bills from the portfolio of the Park Development Board Program (Fund 408) to obtain a total of $2,091,237.50 and to have said sum available for deposit by no later than noon of Wednesday, December 30, 1970. This was to insure the State had funds available for Mrs. Wilson to match the federal funds.

Such proposed sale should be enjoined because once made, even if the funds acquired thereby are not ultimately used for a Mustang Island purchase, the State will be damaged in an amount of $30,501.90 as estimated on December 28, 1970, from Quote Sheets of that date, because of the difference between the yield of the treasury bills presently owned by the fund and the yield of treasury bills available for reinvestment. Yield on treasury bills currently owned varies from 6.87 to 7.29 and yield rate on treasury bills available for present investment range from 4.97 to 5.08.

10.

The provisions of Article III, Page 122 of the Current State General Appropriations Bill, H.B. No. 2, Second Called Session, 61st Texas Legislature, 1969, reads as follows:

> "Any Federal grants, allocations or aids for the conservation and improvement of game, fish and wildlife, or for improving, developing and planning public parks, or for any other program or activity under the statutory authority of the Parks and Wildlife Department, may be accepted and disbursed through the State Treasury by said Department for the purposes for which they were granted and are hereby appropriated for such purposes; provided, however, that expenditure of any such federal grants, allocations, or aids shall not exceed the amounts shown in the schedule of appropriations hereinabove, or for purposes and programs not authorized by said schedule of appropriations; *and shall have the prior written approval of the Governor.* [Emphasis added.]
>
> "Provided, that in addition to appropriated State funds for park purposes and projects for which State and/or local funds are appropriated, the Parks and Wildlife Department is authorized to accept from the Federal Government any funds that may be allocated to the Department under the Land and Water Conser-

vation Fund Act of 1965 (Public Law 88-578) for planning, acquisition and development of the projects and programs authorized by law; and any Federal allocations for outdoor recreation under provisions of said Act; and said Department is hereby authorized to use said Federal funds in addition to appropriations for those purposes out of local and State funds. The Parks and Wildlife Department is authorized to use any of the State funds hereinabove appropriated to it for maintenance, repairs, equipment, development, improvement and administration and other contingencies to match any Federal funds in the event said matching is required to secure Federal funds."

The above language requires the approval of the Governor of Texas prior to any disbursement of funds by the Texas Comptroller of Public Accounts and the Treasurer of the State of Texas; and the State Comptroller of Public Accounts and the State Treasurer should be enjoined from paying out any funds to Mrs. Sam Wilson or anyone else for the purchase of Mustang Island land unless and until the legality of such purchase is determined by the Courts and in order to preserve the Status Quo, Plaintiffs request this Court to issue its Temporary Restraining Order and following notice its preliminary injunction preserving the status quo of the matters at issue until determination of this matter on the merits.

11.

Article III, Section 51, of the Constitution of Texas, Art. 5240, V.A.C.S., and the regulations of the Department of the Interior, Part 675 (Appendix "J" hereto) are violated by the course of conduct of the Secretary of the Interior and Defendants Jersig, Gilvin and Singleton.

Article III, Section 51, of the Constitution of Texas prohibits the Legislature from making or authorizing any

grant of public monies to an individual, yet in this case, without appraisal, the Defendants Singleton, Jersig and Gilvin propose to pay far in excess of the fair market value of the land involved in this controversy. This is a grant of public money in violation of the State Constitution. Additionally, without the Governor's approval it violates Art. 5240, V.A.C.S.

The Secretary of the Interior has approved and enabled such conduct in violation of his own clear regulations which specifically require that an appraisal be made and submitted with the project request. (See Appendix "J" and "K"), and his approval in violation of said regulations is arbitrary and capricious and constitutes an abuse of discretion. Plaintiffs have been adversely affected and aggrieved by such order. Plaintiffs respectfully move the Court to appoint an appraiser to determine the reasonable value of the Mustang Island property and respectfully submit that such an appraisal will indicate the proposed purchase price is far in excess of a fair and reasonable value; is exhorbitant and accordingly not in the best interest of the citizens of the State of Texas. Plaintiff Johnson alleges on information and belief that the fair and reasonable value of Mustang Island does not exceed $300.00 per acre. The contemplated purchase price from Mrs. Wilson is $1,100.00 per acre.

RELIEF REQUESTED

12.

Against the Secretary of the Interior and those under him, Plaintiffs ask a temporary restraining order, and upon hearing, a preliminary injunction maintaining the status quo in this matter until it can be determined on the merits; to prohibit the Department of the Interior from furnishing any federal funding for the purchase of Mustang Island;

and upon final hearing a mandamus ordering the Secretary of the Interior to revoke his approval of such finding and to return the above said application for funding to State Liaison Officer, Johnson, or alternatively to set aside the unlawful federal agency approval of the above said request for funding, all as authorized by 5 U.S.C. 706.

13.

Against Charles W. Croslin and the Texas Parks and Wildlife Department for a temporary restraining order, and upon hearing, a preliminary injunction maintaining the status quo in this matter to prevent the damaging sale of treasury bills as above detailed until such time as this Court can pass on the merits of the case.

14.

Against J. R. Singleton, Robert G. Mauermann, Harry D. Jersig and L. P. Gilvin, for a temporary restraining order, and upon hearing, a preliminary injunction maintaining the status quo in this matter; and to enjoin them from accepting or negotiating any check or warrant or disposing of any cash coming into their hands from either the State or Federal Government by virtue of the proposed Mustang Island purchase from Mrs. Wilson.

15.

Against Mrs. Sam Wilson, Mr. Robert S. Calvert, Texas Comptroller of Public Accounts, and Jesse James, Texas State Treasurer, to enjoin them from accepting or negotiating any check or warrant or disposing of any cash coming into their hands from either the State or Federal Government by virtue of the proposed Mustang Island purchase from Mrs. Wilson.

16.

For such other and further relief to which Plaintiffs are entitled, at law or in equity; and further, for the appointment of an appraiser to make and file herein a written appraisal, of the Mustang Island property pursuant to Bureau of Outdoor Recreation Manual.

LIDDELL, SAPP, ZIVLEY & BROWN

By: /s/ W Robert Brown

By: /s/ Glen E. Clover

510 Gulf Building
Houston, Texas 77002
223-4151

Attorneys for Plaintiffs

Of Counsel:

JOHNSON, JONES & SHEPPARD

By: /s/ Pearce Johnson

608 Brown Building
Austin, Texas 78701

AFFIDAVIT

THE STATE OF TEXAS }
COUNTY OF TRAVIS }

I, Pearce Johnson, a party to the above suit and an attorney of this Court do hereby swear to and verify that the statements contained in the above pleading are true and correct except where stated to be on belief in the first part of paragraph number 9 and in paragraph 11.

Furthermore, if a restraining order and preliminary injunction are not issued as prayed, irreparable damage will occur by virtue of the following course of events:

(a) Money will be paid out by the Department of the Interior, received by the State and disbursed to Mrs. Wilson.

(b) Other monies will be obtained by a disadvantageous sale (loss of $30,000.00) of treasury notes by the Parks and Wildlife Department and be paid to Mrs. Wilson.

(c) Title to the land will change hands and the requirements of State and Federal Law will be circumvented.

(d) The State Parks Development Program will be severely jeopardized as above set out.

(e) The bond funding program for State Parks will be seriously impaired.

(f) The public will be ill served by sale of the proposed land at an inflated price without appraisal or survey.

/s/ PEARCE JOHNSON

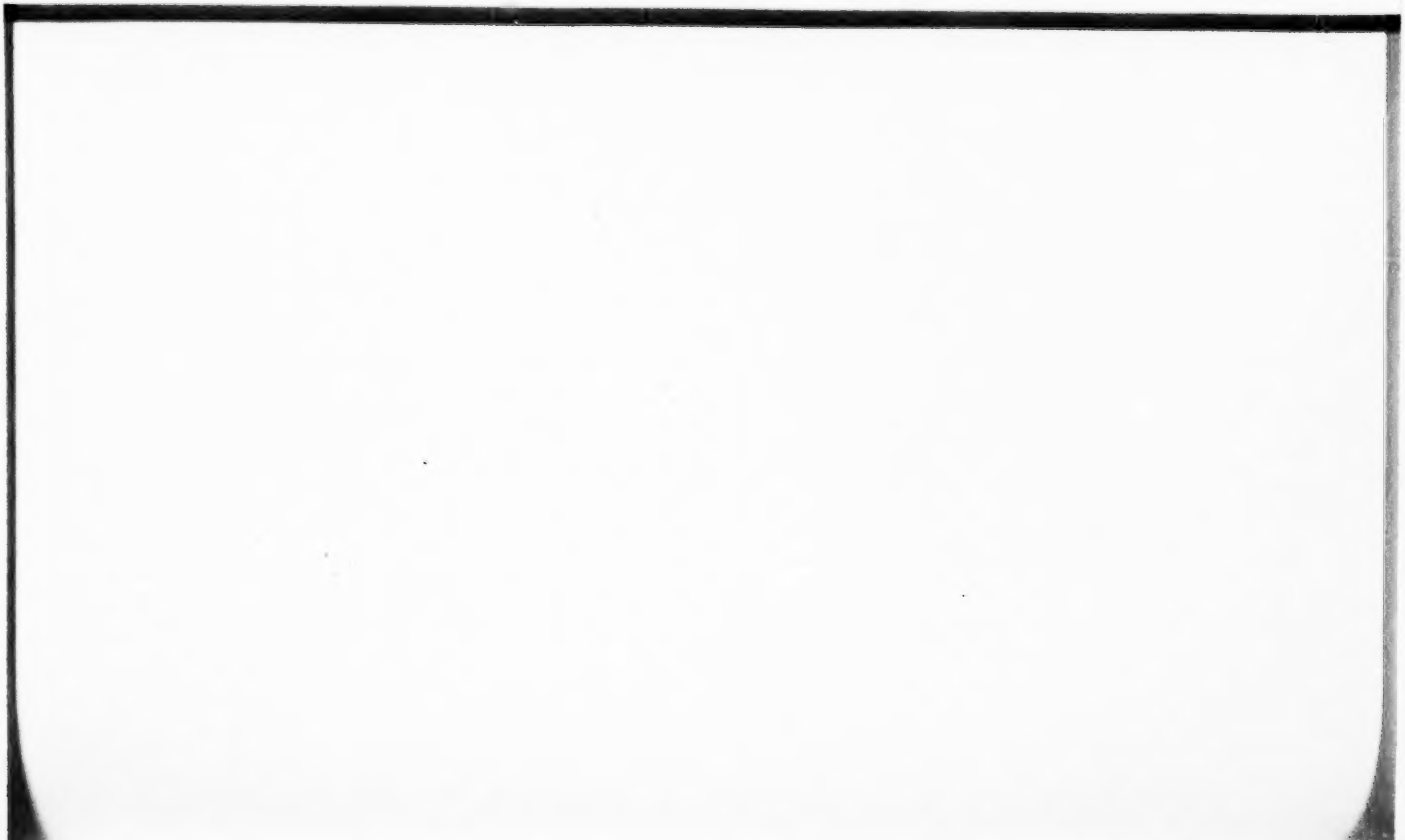
SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this the 15th day of January, 1971, to certify which witness my hand and seal of office.

/s/ LEONNA WHITEHEAD
Notary Public in and for
Travis County, Texas
Commission Expires 6-1-71

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing First Amended Complaint was mailed to the following attorneys of record on January 15, 1971: Seagal V. Wheatley, United States Attorney, Western District of Texas, Room 343, Federal Building, P. O. Box 1701, San Antonio, Texas 78706; W. O. Schultz, II, Assistant Attorney General of Texas, Capitol Station, Austin, Texas 78711; Robert C. Eckhardt, 3312 "N" Street, N.W., Washington, D.C. 20007; Thomas Gibbs Gee and J. Chrys Dougherty, Graves, Dougherty, Gee, Hearon, Moody & Garwood, P. O. Box 98, Austin, Texas 78767.

/s/ W. Robert Brown



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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1608

PEARCE JOHNSON, ET AL, PETITIONERS

v.

ROGERS C. B. MORTON, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR MRS. SAM WILSON, JR. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, pp. A-1 through A-10) is reported at 456 F.2d 68, and its opinion denying rehearing and rehearing en banc (Pet. App. B, p. B-1) is reported at 456 F.2d 74. The judgment of the Court of Appeals issued as mandate (Pet. App. C, p. C-1) is not reported. The memorandum opinion and order of the district court (Pet. App.. D, pp. D-1 through D-30) is not reported.

JURISDICTION

The Court of Appeals denied the petition for rehearing and rehearing en banc on March 13, 1972 (Pet. App. B), and the petition for a writ of certiorari was filed on June 9, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Petitioners have alleged an injury in fact to an interest protected by the Federal Land and Water Conservation Fund Act arising out of the approval by the Secretary of Interior of federal matching funds for the acquisition of a state park.

STATUTES INVOLVED

The Land and Water Conservation Fund Act of 1965 (16 U.S.C. §§460e-4—460e-11) (Pet. App. E, pp. E-1—E-18) is involved. Article 978f-3a of the Texas Constitution and Article 6081r, Texas Revised Civil Statutes, are involved.

STATEMENT

On November 10, 1970, the Texas Parks and Wildlife Commission voted to preserve a portion of Mustang Island as a state park. One-half the purchase price for the park to be purchased from Mrs. Sam Wilson, Jr., was to be paid with federal matching funds. The Secretary of the Interior approved federal matching funds for the purchase on December 16, 1970. Pearce Johnson, Don Kennard, Ben Atwell and Peyton Walters ("Petitioners") filed their action to prevent the consummation

of the purchase. The District Court permanently enjoined the park purchase. The Court of Appeals reversed the District Court and dismissed the action because the plaintiffs' allegations failed to demonstrate standing in any of them to challenge the park purchase.

For standing, each Petitioner alleged that he had no interest in Mustang Island but that funds would not be available for park purposes in other parts of Texas if Mustang Island were purchased. It was also alleged that the purchase of Mustang Island was not in accordance with Texas' State Comprehensive Otudoor Recreation Plan (SCORP). SCORP, a multi-volume plan for park acquisition and development, was prepared by the Texas Parks & Wildlife Department at the direction of the Secretary of Interior pursuant to the Land and Water Conservation Fund Act in order to qualify Texas to receive federal matching funds for park acquisition and development.

Under the Act the Secretary or his agent makes the final determination whether proposed projects are in accordance with SCORP. The Mustang Island project was judged to be in accordance with SCORP by the Executive Director of the Texas Parks & Wildlife Department, by a majority of the Texas Parks & Wildlife Commission, by the Planning Division of the Mid-Continent Region of The Bureau of Outdoor Recreation (BOR), by the Grant Division of the Mid-Continent Region, by the Regional Director of BOR, and by the Director of BOR in Washington.

As to their individual interests as plaintiffs, Johnson alleged he as state liaison officer did not submit the application for federal matching funds and that he also attempted to retrieve the application from the hands of the Bureau of Outdoor Recreation. Ben Atwell alleged only that he is a "duly elected State Representative from Dallas County, Texas." Don Kennard alleged only that he is a "duly elected State Senator from Tarrant County, Texas." Peyton Walters alleged that he is Judge of Polk County, Texas, and that the purchase of Mustang Island would preclude the purchase of park lands in Polk County. It was also alleged that development of existing parks beyond "first phase development" would be halted. The Petitioners also alleged that they represented a class consisting of "all Texas citizens who are for the orderly development of Texas Parks and Recreational Facilities in accordance with the State Comprehensive Outdoor Recreational Plan." The district court, however, ruled that the petitioners had not identified an adequately defined and clearly ascertainable class of persons, and that the suit could not properly be maintained as a class action. The petitioners did not appeal this ruling to the Court of Appeals.

The district court deferred its decision on the threshold question whether the plaintiffs' allegations were sufficient for standing until the evidence had been heard, then found that the Petitioners had standing in their individual and official capacities to challenge the Secretary's approval of funds for Mustang Island. The Court

of Appeals reversed the District Court and sustained Mrs. Wilson's contention that the allegations of the plaintiffs were not sufficient to show an injury in fact to an interest protected by the Federal Land and Water Conservation Fund Act.

Respondents contended in the Court of Appeals that the Petitioners' allegations of injury resulting from the challenged action of the Secretary failed to show any injury in fact to any plaintiff in his official or individual capacities. The Court of Appeals sustained this contention. It held that "at best, the injury complained of amounts to a frustration of [the Petitioners'] interest in the allocation of state funds for recreational purposes." (Pet. App. A, A-9). The Court of Appeals stated that the decision of the Texas Parks & Wildlife Commission "to devote all available state funds to the acquisition and development of Mustang Island" is a matter of "state policy to which the Secretary of the Interior is not privy." (*Id.*).

ARGUMENT

Petitioners' contentions were presented to the court below and were rejected after careful consideration. The decision of the Court of Appeals in this case comports fully with this Court's decisions in *Sierra Club v. Rogers C. B. Morton*, _____ U.S. _____, 31 L.Ed.2d 636 (1972) [No. 70-34, decided April 19, 1972, 40 Law week 4397], *Data Processing Service v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970). The holding below is therefore correct, and there is no conflict of decisions or other reason for further review.

1. The court of appeals correctly applied the dual test of standing articulated by this Court in the *Camp* and *Barlow* cases. Assuming arguendo as did the court below that the Petitioners' alleged interests "as concerned citiezns for orderly development of recreational resources" and as "public officials charged with a public trust" are within the zone of interests protected by the relevant statute, the Land and Water Conservation Fund Act, the Petitioners failed to allege an injury in fact to that interest arising out of the action complained of. The "action" is the approval of federal funds by the Secretary. The alleged "injury" is that if these funds are allocated to Mustang Island, funds will not be available for park land that the Commission *might* decide to purchase in other areas of the state and as to which the Commission *might* decide to apply for federal matching funds.

As the court below stated, the "injury" complained of amounts to a frustration of their interest in the allocation of state funds for recreational purposes. Disappointment that a benefit has been conferred in some area in which the complainant does not have a direct interest is not sufficient for standing. *Harrison-Halsted Community Group v. Housing & Home Finance Agency*, 310 F.2d 99, 105 (7th Cir. 1962); *Paducah Junior College v. Sec'y of Health, Education & Welfare*, 255 F. Supp. 147 (W.D. Ky 1966). Moreover, contrary to Petitioners' allegations, the Parks & Wildlife Commission has *not* abandoned the Lake Livingston project. Moreover, despite lengthy testimony on this subject, the

district court did *not* find that the Livingston project had been precluded by Mustang Island. The district court did *not* find that Mustang Island would exhaust federal funds for other Texas park projects. The Attorney General *has* formally ruled that the contract to purchase Mustang Island is a valid and binding obligation of the State of Texas. His opinion is attached as Appendix A.

Contrary to Petitioners' contentions (Pet. 8-10), the decision of the court below in no way conflicts with this Court's decision in *Sierra Club v. Morton*. In the *Sierra Club* case injury in fact was clearly alleged. Certainly, as this Court stated in the majority opinion in *Sierra Club*, development that "would destroy or otherwise affect the scenery, natural and history objects and wildlife of the park and impair the enjoyment of the park for future generations" is harm within the concrete detriment requirement for standing. The opposite situation is presented in the instant case. The Petitioners seek to *prevent* the establishment of a park on an island that is threatened with commercial development. Certainly if Justice Douglas' analysis had been adopted by the majority in *Sierra Club*, Mustang Island itself would be a party respondent in the instant case. Certainly, as the Petitioners must and do admit, the effect of the Secretary's action is no "injury" to Mustang Island or to those persons who wish it preserved and protected against commercial development.

2. Contrary to his allegations, Johnson has no special interest in his *former* official capacities sufficient for

purposes of standing. (Governor Preston Smith has replaced Petitioner Johnson as Chairman of the Parks & Wildlife Commission and as State Liaison Officer). As Chairman of the Commission Johnson was simply outvoted by the other two Commissioners. The undisputed effect of the Commission vote is to commit *State* funds to the project. Clearly the frustration of a state official resulting from his being outvoted in the allocation of state funds for park land acquisition is not an "injury" arising out of the subsequent approval of *federal* funds by the Secretary. The Secretary's action has nothing whatever to do with the allocation of state funds.

Federal funds were approved by the Secretary upon the application of the Parks & Wildlife Commission. The Parks & Wildlife Commission, which undisputedly acts by majority vote, is designated by law as the entity to submit applications for federal matching funds.[1] It is not the intent of the Land & Water Conservation Fund to protect the questionable prerogative of the State Liaison Officer to submit applications. The purpose clause of the Act does not mention the State Liaison Officer.[2] The entire Act does not mention the State Liaison Officer.[3] *Leuthold v. Camp*[4] and *Nuesse v. Camp*[5] cited by the Petitioners are not in conflict with the decision of the court below; the cases are not rele-

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[1] Art. 6081r, Tex. Rev. Civ. Stats. An.
[2] 16 U.S.C. §460e-4
[3] 16 U.S.C. §§460e-4 through 460e-11
[4] 405 F.2d 499 (9th Cir. 1969)
[5] 385 F.2d 694 (D.C. Cir. 1967)

vant. Both involve state officials with clear duties under state law that are in possible conflict with duties under federal law. The "State Liaison Officer" has *no* duties under state law. Neither the Constitution nor any statute of the State of Texas grant any authority or impose any duties on a "State Liaison Officer." On the contrary, the position is purely a creation of the BOR Manual for the convenience of the Secretary of the Interior. The duty of administering federal funds received by Texas under the Land and Water Conservation Fund Act is plainly imposed upon the Parks & Wildlife Department. The Parks & Wildlife Department is run by the Executive Director under the policy direction and guidance of the Commission.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
J. CHRYS DOUGHERTY
Attorney for Respondent,
Mrs. Sam Wilson, Jr.

H. LEE GODFREY
GRAVES, DOUGHERTY, GEE,
HEARON, MOODY & GARWOOD
Attorneys for Respondent,
Mrs. Sam Wilson, Jr.

JULY 5, 1972

APPENDIX A

THE ATTORNEY GENERAL OF TEXAS

CRAWFORD C. MARTIN
ATTORNEY GENERAL

AUSTIN, TEXAS 78711

May 25, 1972

Opinion No. M - 1130

Re : Validity of contract involving acquisition of Mustang Island by the State of Texas, obligations upon the present Commission and remedies available to seller in case of dishonor by the State.

Honorable James U. Cross
Executive Director
Parks and Wildlife Department
John H. Reagan Building
Austin, Texas 78701

Dear Mr. Cross :

In your recent request for opinion of this office, you state that instruments constituting a contract were executed on behalf of the Texas Parks and Wildlife Department by former Executive Director J.R. Singleton and former Acting Executive Director, Robert G. Mauermann, with Mrs. Ada Rogers Wilson concerning the sale of her interest in Mustang Island to the State of Texas. You ask the following questions :

1. Is the contract valid?

2. If the contract is determined to be valid, what are the contractual obligations of the present Commission?

3. If the present Commission chooses not to honor the contract, what would be Mrs. Ada Rogers Wilson's remedy at law?

In answer to your first question you are advised that Article 978f-3a, Sec. 3, Vernon's Penal Code, provides in part that :

> "The Parks and Wildlife Commission shall have power and authority to appoint an Executive Director who shall be the chief executive officer of the Parks and Wildlife Department and shall perform its administrative duties ..."

We are advised that there were in effect at the time of the execution of these contracts, resolutions of the Commission specifically authorizing the execution of land purchase contracts by the Executive Director.

From an examination of the instruments and the facts before this office, we hold that the contract is valid and duly authorized at least by a majority of the members of the Commission at the time of its execution and it is currently valid and legally binding as an obligation of the State of Texas. They appear to be for a lawful purpose and are in acceptable form. In our opinion, nothing has happened to change the legal status of the contract since its execution.

In answer to your second question, wherein you ask what are the contractual obligations of the present Commission, you are advised that the contractual obligations of the present Commission are the same as those of the Commission that authorized the execution of the contracts, which duty and obligation is to carry out the terms and conditions of the contract. All instruments in this connection which were duly executed and valid are still

binding upon the state, including the voucher previously submitted to the Comptroller of Public Accounts. Although the membership of the commission has changed and its number has been increased, it nevertheless remains the same legal entity that authorized the execution of the contract. The new membership, however, is not required affirmatively to ratify the acts of an earlier commission.

It is possible that this second question is inquiring further than the above answer would indicate, and that you are asking what action must this present Commission take now. If this be the case, the answer would be, "None." The contracts were executed, the machinery for closing the transaction was initiated and the transaction would have long since been consummated had there not been an injunction issued by the Federal District Court for the Western District of Texas. This injunction has now been set aside by the Fifth Circuit United States Court of Civil Appeals. There exists no present legal impediment to the closing of the transaction and administratively the same should be so processed unless stopped by affirmative action of a majority of the Commission. The rights and responsibilities of a state under a contract are generally the same as those of individuals and the obligations arising are binding on the state. 52 Tex. Jur. 2d 740, State of Texas, Sec. 31; 81 C.J.S. 1122, States Sec. 25; 49 Am. Jur.285, States, etc., Sec. 74, and many cited cases therein.

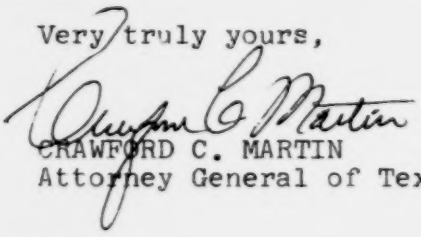
In answer to your hypothetical third question concerning the seller's remedy at law in the event the Commission chooses not to honor the contract, you are advised that this office will presume that the present commission will honor its valid contractual obligations and perform its legal duties.

For this office to set forth the various legal remedies of the seller, Mrs. Wilson, in the event the Commission breaches its contractual obligations would be to render legal advise for the benefit of unauthorized private individuals and a violation of Article 4399, Vernon's Civil Statutes.

SUMMARY

The contract involving the acquisition of Mustang Island by the State of Texas constitutes a valid, binding obligation of the State of Texas, and the contractual obligations of the present Commission are to carry out the terms and conditions thereof.

Very truly yours,



CRAWFORD C. MARTIN
Attorney General of Texas

Prepared by Harold Kennedy
Assistant Attorney General

APPROVED :
OPINION COMMITTEE

Kerns Taylor, Chairman
W.E. Allen, Co-Chairman

FILE COPY

FILED
JUL 12 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1608

PEARCE JOHNSON, ET AL
Petitioners

v.

ROGERS C. B. MORTON, ET AL
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1608

PEARCE JOHNSON, ET AL
Petitioners

v.

ROGERS C. B. MORTON, ET AL
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is not reported and is set forth in Appendix C of the Petition. The opinion of the Court of Appeals for the Fifth Circuit is not reported and is set forth in Appendix A of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Petitioners, Plaintiffs in the District Court, have standing under U.S.C. § 702 to review the action of the Secretary of Interior in approving the use of Federal funds under the Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§460*l*-4 through 460*l*-11, for the purpose of matching funds from the

Texas Park Development Fund for the acquisition of a state park on Mustang Island.

STATUTES INVOLVED

In addition to the Land and Water Conservation Fund Act of 1965 (Appendix E of the Petition) and the Administrative Procedure Act (Appendix F of the Petition), the following state statutes are relevant to an understanding of this case and are reproduced in appendicies to this brief: Article 978f-3a, Vernon's Texas Penal Code (Appendix A); Article 6070h, Vernon's Texas Civil Statutes (Appendix B); Article 6081r, Vernon's Texas Civil Statutes (Appendix C).

STATEMENT

The statement contained in the Petition warrants clarification in the following respects.

Under the provisions of Article 978f-3a, Vernon's Texas Penal Code (Appendix A), the Parks and Wildlife Department is under the *policy* direction of the Parks and Wildlife Commission. The Commission consists of three members, one of whom is designated as chairman by the governor. A quorum for official business is two members. The Executive Director, appointed by the Commission is the chief executive officer of the Parks and Wildlife Department and performs the administrative duties of the department.

Article 6070h, Vernon's Texas Civil Statutes (Appendix B) establishes the Texas Park Development Fund to be used by the Parks and Wildlife Department for the acquisition of state park sites.

Article 6081r, Vernon's Texas Civil Statutes (Appendix C) designates the Parks and Wildlife Department as the state agency authorized to cooperate with the Federal government in the administration of the

Land and Water Conservation Fund Act of 1965, including the planning, acquisition, operation and development of the outdoor recreation resources of the state. This designation is in compliance with the mandate of § 460*l*-8(d)(1) of the Land and Water Conservation Fund Act of 1965.

On November 10, 1970, the Parks and Wildlife Commission decided to buy as much of the Wilson property on Mustang Island as they could pay for with state and federal funds. (R. 54-56; 515-516; 518) (Pl. Ex. #11) (R. 547).

The report that the Parks and Wildlife Department was short $1,000,000.00 in BOR funds to make the acquisitions in question was determined to be erroneous. (R. 519, 553).

In reversing the judgment of the District Court, the Court of Appeals for the Fifth Circuit held that Petitioners lacked standing to bring this action and that any alleged injury suffered by Petitioners was the result of action taken by the Parks and Wildlife Department and was properly cognizable by a Texas court not a federal court. (Petition Appendix A).

ARGUMENT

The Petitioners rely upon 5 U.S.C. § 702 as the basis for review of the action of the Secretary of Interior in approving the application of the Parks and Wildlife Department for federal funds to aid in the purchase of the Wilson property on Mustang Island. That provision reads as follows:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

This Court has held that persons have standing to obtain judicial review under this provision of the Ad-

ministrative Procedure Act only in those instances in which the challenged action causes those seeking review "injury in fact," and the interest injured is "within the zone of interests to be protected or regulated" under the laws which are claimed to have been violated. *Association of Data Processing Service Organizations v. Camp,* 397 U. S. 150 (1970); *Barlow v. Collins,* 397 U.S. 159 (1970). In both of these cases the plaintiffs alleged that the agency action had adversely affected their economic position and this Court found that they had standing to challenge the agency action which affected that economic position. Petitioners in the case sub judice have not alleged nor proved an economic injury. Indeed, their First Amended Complaint (Petition Appendix G) does not allege injury of any kind to the individual petitioners, nonetheless petitioners assert that they have been injured in the following respect:

> "Petitioners are users of state parks who reside in areas which allegedly would be deprived of needed parks by depletion of funds in the acquisition of Mustang Island. The Secretary's approval of the Mustang Island application adversely affects Petitioners' use of existing and proposed state park facilities, and they are, therefore aggrieved by the Secretary's unlawful action. Although this is true of all the Petitioners, this injury is most obvious in the case of Petitioner Walters. He resides in Polk County, Texas, near Lake Livingston. The Texas Parks and Wildlife Commission has considered acquiring land on Lake Livingston for a state park. The depletion of funds by the proposed acquisition of Mustang Island has caused the Commission to abandon its efforts to obtain a park site on Lake Livingston. This adversely affects Petitioner Walters' recreational interest as a user of existing park facilities on Lake Livingston which are already overcrowded." (Petition p. 9).

Reference to the testimony of the individual petitioners reveals that their injury is not as grievous as they would have us believe and in fact amounts to nothing more than a general dissatisfaction with the course of action chosen by the Commission.

Petitioner Walters testified at length about the crowded conditions of the recreational facilities around Lake Livingston. His testimony, at best, presents these points: his understanding was that the Commission would purchase and develop a park site on Lake Livingston; the park and recreational facilities at Lake Livingston are overcrowded; many people from Houston come to the Lake Livingston area; the crowding of the present facilities causes a law enforcement problem and a sanitation problem in Polk County; if more recreational facilities could be developed around Lake Livingston, it would be more enjoyable for him and his family; purchase of Mustang Island will prevent the Commission from developing park facilities at Lake Livingston.[1] (R. 650-654, 656-658, 661-672).

Petitioner Don Kennard, a State Senator from Fort Worth, Texas, testified that he is an avid canoeist and camper and has pursued those activities throughout the state. (R. 633, 635). The only injury he complains of is to his desire to see more parks in his area of the state and is reflected in the Record at 635 lines 20-25 and 636 lines 1-8:

> "Q As a private citizen, do you feel that your interest as a user of the recreational facilities of the State of Texas will be injured by the Mustang Island proposed acquisition?
>
> "A Yes, I certainly do.

[1]Petitioners fail to inform the Court that the Parks and Wildlife Department has in fact acquired the park site on Lake Livingston which petitioner Walters proselytized for so diligently.

"Q In what respects, Senator Kennard?

"A As a private citizen, as one who enjoys camping and the recreational facilities of the State of Texas, I feel that the area in which I live and which is most convenient to me should have adequate facilities for this very purpose. As it is today, the people close to where I live, Dallas, Fort Worth, have to go many miles to thoroughly and fully enjoy recreational facilities provided by the State of Texas."

This is the only testimony relating to an injury to the interest of Senator Kennard.

Petitioner Ben Atwell lives in Dallas County, Texas, and is a long-time member of the Texas House of Representatives. (R. 626). He has received several awards from conservation groups in recognition of his work in the field of conservation and water safety. (R. 627). He has engaged in boating, hunting, and camping activities and has visited several state parks scattered across the state. (R. 628). He is specifically interested in having more state parks oriented toward water activities located in his part of the state. (R. 631). According to his testimony, he will suffer no injury by virtue of the acquisition of Mustang Island, as reflected in the Record at pages 629 lines 24-25, 630 lines 1-2, 6-8:

"Q . . . as an enthusiast of outdoor recreation facilities. How would it affect you by locating this park down there that they are proposing on Mustang Island?

"A The only way I know how to answer that question is: as far as I'm personally concerned it would probably not have any effect at all."

Petitioner Pearce Johnson is Chairman of the Parks and Wildlife Commission and State Liaison Officer.[1]

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[1]His designation as State Liaison Officer is meaningless in view of the provisions of Article 6081r, Vernon's Texas Civil

(R. 5). He testified that in his individual capacity he has used the parks and recreational facilities as a place to camp and stable his daughter's horses when she goes to horse shows. "Basically that is my reason for traveling in the state parks and I have used them a little bit otherwise." (R. 693-694). His testimony relating to his personal injury is found in the Record at 694 lines 21-25 and 695 lines 1-5:

> "Q Well, this proposed Mustang Island acquisition, will that injure your personal interest as a user of the State's facilities?
>
> "A Yes sir, it would.
>
> "Q In what respect?
>
> "A It would result in depriving me as a user, as everybody who is a user, of the facilities that rightfully should be scattered out throughout the State and it would cut down on the services that are afforded by our State Park System."

Basic to the question of standing is the long-established principle that one may only seek redress in the courts for wrongs done to them, not to others. *Virginia Railway v. System Federation #40,* 300 U.S. 515, 558 (1937); *Erie Railroad Co. v. Williams,* 233 U.S. 685, 697 (1914); *Moose Lodge #107 v. Irvis,* 40 U.S.L.W. 4715 (1972). It is clear from *Data Processing v. Camp* and *Barlow v. Collins* that economic injury to the individual is sufficient basis for standing. And, once the fact of economic injury to the individual is established, the injured person may argue the public interest in support of his contenttion that the agency action is wrongful, *Scripps-Howard Radio, Inc. v. F.C.C.,* 316

Statutes, which designates the Parks and Wildlife Department as the agency with authority to cooperate with the federal government under the Land and Water Conservation Fund Act.

U.S. 4 (1942); *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), but individualized injury is essential to standing. Individualized injury is also essential to standing in cases where the claimed injury is to an interest of a noneconomic nature that is widely shared by others. *Sierra Club v. Morton*, —— U.S. ——, 92 S.Ct. 1361 (1972). The plaintiff in that case sought to challenge the action of the U. S. Forest Service in approving the construction of a large recreational area in Northern California. Plaintiff alleged that it had a "special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the county," 92 S.Ct. 1364, and claimed the agency action (1) allowed development of an area in excess of that allowed by 16 U.S.C. § 497, (2) destroyed timber and natural resources in violation of 16 U.S.C. §§ 41 and 43, (3) and violated the rules and regulations of the U. S. Forest Service and Department of the Interior. In affirming a judgment of dismissal for lack of standing, this Court stated at 92 S.Ct. 1367-1369:

> "The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been towards recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and towards discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review. We noted this development with approval in *Data Processing, supra*, at 154, 90 S.Ct., at 830, in saying that the interest alleged to have been injured 'may reflect "aesthetic, conversational, and recreational" as well as economic values.' *But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement*

that the party seeking review must have himself suffered an injury." (Emphasis added)

"....

"... But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA. The Sierra Club is a large and long-established organization, with an historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

"The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process. The principle that the Sierra Club would have us establish in this case would do just that."

Petitioners in the case sub judice can fare no better than the Sierra Club because they neither allege nor

prove an injury to themselves. The testimony of each of petitioners merely shows that they would prefer that more parks be developed in the immediate area of their residence rather than on Mustang Island. None of the petitioners testified or alleged that their use of existing park or recreational facilities would be diminished by the establishment of a park on Mustang Island. Petitioner Atwell disavowed any personal injury. Petitioner Walters has gotten the park which he testified that the acquisition of Mustang Island would prohibit. Petitioners Kennard, Walters, and Johnson "seek to do no more than vindicate their own value preferences" as to where and when parks should be acquired and developed. They, like everyone else, would like to see parks developed in their immediate areas. Theirs is a selfish interest shared by many, but not such an interest as would render them "adversely affected" or "aggrieved" within the contemplation of the APA as construed by this Court in *Sierra Club v. Morton.*

Petitioner Johnson's contention that the decision of the court below conflicts with the decisions in *Leuthold v. Camp,* 273 F.Supp. 695 (D. Mont. 1967) aff'd 405 F.2d 499 (9th Cir. 1969) and *Nuesse v. Camp,* 385 F.2d 694 (D.C. Cir. 1967) and that he has standing under those decisions because as Chairman of the Parks and Wildlife Commission and as State Liaison Officer he has primary responsibility for administering state and federal law relating to state park acquisition in Texas is without merit.

In both *Leuthold* and *Nuesse* a single state official was charged with supervisory power over state banks and charged with executing all laws relating to banks. Camp, the Comptroller of Currency of the United States, had ruled in both cases that national banks could establish branch banks in spite of the fact that

the state law in each instance prohibited branch banking. The state official in each of those cases was held to have standing to challenge the ruling of the Comptroller because it impinged upon his ability and duty to enforce the state law against branch banking, a right peculiar to the state official individually. Petitioner Johnson cannot cast himself in that mold. As Chairman of the Parks and Wildlife Commission, he has no singular responsibility to enforce any law or policy. He is merely one member of a three-member commission and has no greater vote or voice in the performance of the commission's functions than the other members of that commission. The actions of the commission are determined by majority vote of its members. Petitioner Johnson was outvoted in this instance and his position as chairman of the commission does not give him veto power. (See Appendix A and B). Neither can Petitioner Johnson gain standing through his designation as State Liaison Officer. The Texas Legislature has seen fit to designate the Parks and Wildlife Department as the state agency to cooperate with the federal government in the administration of the Land and Water Conservation Fund Act of 1965. (See Appendix C). The designation of the Department to act in that capacity is contemplated and authorized by 16 U.S.C. § 460*l*-8(d)(1). Petitioner Johnson's designation by the governor as State Liaison Officer for purposes of administering the Land and Water Conservation Fund Act of 1965 cannot override the Legislature's designation of the Parks and Wildlife Department as the official agency to perform that function. *Constantin v. Smith,* 57 Fwd. 227 (E.D. Tex. 1932) appeal dismissed 287 U.S. 378; *Brown Cracker & Candy Co. v. Dallas,* 104 Tex. 290, 137 S.W. 342 (1911).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I, W. O. Shultz II, one of counsel for the respondent state officials in this cause, and a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of the foregoing response to the petition for writ of certiorari have been mailed to the following attorneys of record in this cause:

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APPENDIX A

Article 978f-3a, Vernon's Texas Penal Code

Section 1. From and after the effective date of this Act, the Game and Fish Commission shall be reconstituted and known as the "Parks and Wildlife Department," which shall be under the policy direction of a Commission which shall consist of three (3) members, one (1) of whom shall be designated by the Governor as Chairman. The members of the Parks and Wildlife Commission shall be appointed by the Governor, which appointments shall be with the advice and consent of two-thirds (2/3) of the Members of the Senate present, if in Session, and if not in Session, the Governor shall appoint such Members and issue a commission to them as provided by law, and their appointment shall be submitted to the next Session of the Senate for their advice and consent in the manner that appointments to fill vacancies under the Constitution are submitted to the Senate. The Governor shall appoint the members of the Parks and Wildlife Commission, one (1) whose term shall expire February 1, 1965, one (1) whose term shall expire February 1, 1967, and one (1) whose term shall expire February 1, 1969, or until their successors are appointed and qualified. In case of a vacancy in Commission membership, the Governor shall appoint a replacement member to fill the unexpired term of the vacating member. A quorum for the dispatch of official business shall be two (2) members. Thereafter, the Governor shall appoint members for terms of six (6) years. The members of said Commission shall be reimbursed for their actual expenses incurred in attending meetings, and shall be paid a per diem as set out in the General Appropriations Act. The Commission shall meet as often as it deems necessary, but shall meet at least once every quarter of the year.

Sect. 2. The term of office of the present members of the Game and Fish Commission shall expire with the effective date of this Act; provided, however, that this provision shall not preclude the Governor from appointing one (1) or more members to the Parks and Wildlife Commission provided for in Section 1 of this Act.

Sec. 3. The Parks and Wildlife Commission shall have the power and authority to appoint an Executive Director who shall be the chief executive officer of the Parks and Wildlife Department and shall perform its administrative duties. Such Executive Director shall have authority to appoint such heads of divisions, game and fish wardens, park managers, and other employees as may be authorized by appropriations therefor and as may be deemed necessary for executing, administering and carrying out the duties and services authorized by law to be performed by the Parks and Wildlife Commission and the Parks and Wildlife Department. The Executive Director shall serve at the will of the Parks and Wildlife Commission. All other employees shall serve at the will of the Executive Director.

Sec. 4. The State Parks Board is hereby abolished and all powers, duties and authority heretofore vested in the State Parks Board are hereby transferred to the Parks and Wildlife Department provided for herein. The terms of office of the present members of the State Parks Board are hereby terminated and this provision shall not preclude the Governor from appointing one (1) or more members of the State Parks Board to the Parks and Wildlife Commission provided for in Section 1 of this Act.

Sec. 5. The Parks and Wildlife Department provided for herein shall exercise and perform all powers and duties heretofore vested in the Game and Fish

Commission prior to the effective date of this Act, and the State Parks Board prior to the effective date of this Act, and that portion of the program administered by the Parks and Wildlife Department which deals with the operation, maintenance, and improvement of State Parks shall be financed from the General Revenue Fund, the State Parks Fund, other funds as may be authorized by law, and such donations, grants, and gifts as may be received by said Department. No donations, grants or gifts accruing to the State of Texas or received by the Parks and Wildlife Department herein created, or now on hand in the presently constituted State Parks Department for the purpose of operating, maintaining, improving or developing State Parks, shall be used for any other purpose than the operation, maintenance, or developing of State Parks.

Sec. 6. The State of Texas assents to the provisions of the Acts of the U. S. Congress entitled "An Act to provide that the United States shall aid the states in wildlife-restoration projects, and for other purposes," approved September 2, 1937 (Public Law No. 415, 75th Congress), and "An Act to provide that the United States shall aid the states in fish-restoration management projects, and for other purposes," approved August 9, 1950 (Public Law No. 681, 81st Congress), and any amendments thereto, and the Parks and Wildlife Commission is authorized and empowered to perform such acts as may be necessary to the conduct and establishment of cooperative wildlife-restoration and cooperative fish-restoration projects, as defined in said Acts of Congress, in compliance with said Acts, with rules and regulations promulgated thereunder by the Secretary of the Interior, and with enactments of Texas Legislatures; and no funds accruing to the State of Texas from hunting license fees, fishing license fees, commercial fishing boat license fees, oyster license fees,

net license fees, trawl license fees, seine licnse fees, or from any other fees collected by the former Texas Game and Fish Commission, or from any other funds received by the former Texas Game and Fish Commission including fines as a result of action taken by any court for a violation of any game or fish law; or receipts from the sale of shell, sand or gravel shall be diverted for any other purposes than for making necessary studies and management of the fish and game resources of this State and for the expansion and development of additional opportunities of hunting and fishing in State-owned land and waters for the benefit of the public wherever practicable and to embrace wherever feasible the principle of multiple use of our land and waters for better hunting and fishing opportunities. The special Game and Fish Fund shall be used for the purposes provided herein and for the purposes as now described by law and nothing shall be done to jeopardize or divert this Fund or any portion thereof including Federal aid as described in Section 6 of this Act.

APPENDIX B

Article 6070h, Vernon's Texas Civil Statutes

Texas Park Development Fund

Conditional enactment

Section 1. That this Act shall become effective and operate only upon conditions that House Joint Resolution No. 12 adopted by the 60th Legislature, 1967, and proposed as an amendment adding Section 49e to Article III of the Constitution of Texas, shall be adopted; and in that event, the effective date of this Act shall be the date on which the Governor declares such constitutional amendment adopted; otherwise, this Act shall be of no force or effect.

Definitions

Sec. 2. For the purposes of this Act the terms:

(a). "Department" means the Parks and Wildlife Department.

(b). "Commission" means the Parks and Wildlife Commission.

(c). "Chairman" means the Chairman of the Parks and Wildlife Commission.

(d). "Director" means the Executive Director of the Parks and Wildlife Department.

(e). "Bonds" shall mean the Texas Park Development Bonds authorized or permitted by the constitutional amendment submitted at the election held on November 11, 1967.

Governmental functions of Parks and Wildlife Department

Sec. 3. The Parks and Wildlife Department is hereby authorized to perform the governmental functions authorized by this Act.

Bond issues; resolution; proceeds; interest; form of bonds; registration and approval; replacement bonds

Sec. 4. The department by appropriate action, is hereby authorized from time to time to provide, by resolution of the commission, for the issuance of negotiable bonds in a total aggregate amount not exceeding $75,000,000. All of such bonds shall be issued on a parity and shall be called "State of Texas Park Development Bonds." The proceeds from the sale of any bond, or bonds, shall be used for the purpose of creating the Texas Park Development Fund provided for in the Constitution. At the option of the department, said bonds may be issued in one or several installments. The bonds of each issue shall bear such date as the department shall select, and shall bear a rate or rates of interest as may be fixed by the department, which interest may, at the option of the department, be payable annually or semi-annually; shall mature serially or otherwise not later than 40 years from their date; and may be made redeemable before maturity, at the option of the department, at such price or prices, and under such terms and conditions as may be fixed by the department in the resolution of the commission providing for the issuance of the bonds. The department shall determine the form of the bonds, including the form of any interest coupons to be attached thereto, and shall fix the denomination or denominations of said bonds and the place or places of the payment of the principal and interest thereon. Said bonds shall be executed on behalf of the department as general obligations of the State of Texas in the following manner: They shall be signed by the chairman and the director, and the seal of the department shall be impressed thereon, and they shall be signed by the Governor and attested by the Secretary of State of the State of Texas with the seal of the State of Texas impressed thereon. The resolu-

tion of the commission authorizing the issuance of any installment or series of bonds may prescribe the extent to which facsimile signatures and facsimile seals in lieu of manual signatures and manually impressed seals may be used in executing such bonds and appurtenant coupons. Interest coupons may be signed by the facsimile signatures of the Chairman and the Director. In the event any officer whose signature or facsimile signature appears on any bond, or whose facsimile signature shall appear on any coupon shall cease to be such officer before the delivery of the bond, the signature shall, nevertheless, be valid and sufficient for all purposes the same as if he had remained in office until such delivery had been made. The resolution of the commission may provide for registration of the bonds as to ownership and for successive conversion and reconversion from registered to bearer bonds and vice versa. Before any such bonds so issued are delivered to the purchasers, the record pertaining thereto shall have been examined by the Attorney General of Texas and said records and bonds shall be approved by him. After which approval, the bonds shall be registered in the office of the Comptroller of Public Accounts of Texas. All such bonds, after approval by the Attorney General of Texas, registration by the Comptroller of Public Accounts of Texas, and delivery to the purchasers, shall be incontestable and shall constitute general obligations of the State of Texas. Such bonds having been approved by the Attorney General and registered in the Comptroller's office shall be held, in every action, suit or proceeding in which their validity is or may be brought into question, valid and binding obligations of the State of Texas. In every action brought to enforce collection of such bonds or any rights incident thereto, the certificate of approval by the Attorney General and a certificate of registration by the Comptroller, or duly

certified copies thereof, shall be admitted and received in evidence as proof of their validity. All bonds issued in accordance with and under the provisions of this Act shall be, and are hereby declared to be negotiable instruments under the laws of this state. The department is fully authorized to provide for the replacement of any bond which might have become mutilated, lost, or destroyed.

Refunding bonds

Sec. 5. The department is hereby authorized to provide by resolution of the commission for the issue of refunding bonds for the purposes of refunding any bonds issued under the provisions of this Act and then outstanding, together with accrued interest thereon. The issuance of such refunding bonds, the maturities and all other details thereof, the rights of the holders thereof, and the duties of the department in respect to the same, shall be governed by the foregoing provisions of this Act in so far as the same may be applicable. The refunding bonds may be sold and the proceeds used to retire the outstanding bonds or may be used in exchange for the outstanding bonds.

Legal and authorized investments; security for deposit of state funds; taxation

Sec. 6. All state bonds hereafter issued pursuant to the provisions of this Act shall be and are hereby declared to be legal and authorized investments for banks, savings banks, trust companies, building and loan associations, savings and loan associations, insurance companies, fiduciaries, trustees, guardians, and for the sinking funds of cities, towns, villages, counties, school districts, and all other political subdivisions and public agencies of the State of Texas. Such state bonds when accompanied by all unmatured coupons appurtenant thereto shall be lawful and sufficient secu-

rity for all deposits of state funds, and all funds of any agency or political subdivision of the state, of counties, school districts, cities, and all other municipal corporations or subdivisions at the par value of said bonds. Such state bonds and the income therefrom, including the profits made in the sale thereof, shall at all times be free from taxation within this state.

Notice of sale of bonds; bids

Sec. 7. When the department shall have determined to sell a series of bonds, it shall be the duty of the department to publish at least one time not less than 10 days before the date of said sale an appropriate notice thereof. Said notice shall be published for such number of times as the department may determine in one or more recognized financial publications of general circulation published within the state and one or more such publications published outside the state. The department shall demand of bidders, other than the administrators of the state funds, that their bids be accompanied by exchange or bank cashier's check for such sum as it may consider adequate to be a forfeit guaranteeing the acceptance and payment for all bonds covered by such bids and accepted by the department. No installment or series of said bonds shall be sold for an amount less than the face value of all the bonds comprising such installment or series with accrued interest from their date, and all of such bonds shall be sold after competitive bidding to the highest and best bidder. The department shall have the right to reject any and all bids.

Entrance or gate fees; deposit of funds

Sec. 8. The department, from and after the effective date of this Act, and continuing so long as any of said bonds are outstanding, shall, wherever feasible, charge and collect entrance or gate fees to state park

sites. All income derived from the charging of entrance or gate fees, less any amounts necessary to pay for expenses incurred in making these charges, shall be deposited in a special fund with the state treasurer, and said amounts to be deposited shall hereinafter be referred to as net income.

Special funds

Sec. 9. For the purposes of administering the moneys provided for in this Act, there are hereby created the following special funds:

(a) The "Texas Park Development Fund," hereinafter called "Development Fund," into which shall be deposited the proceeds derived from the sale of the State of Texas Park Development Bonds, and which fund shall be used for the purpose of acquiring lands for state park sites and for developing said sites as state parks. The expense of issuing bonds shall be considered as part of such costs.

(b) The "Texas Park Development Bonds Interest and Sinking Fund," hereinafter called "Interest and Sinking Fund," to be used exclusively for the purpose of paying principal of and interest on the bonds herein provided as the same mature and exchange and collection charges in connection therewith. Accrued interest received in the sale of any bonds shall be deposited in the Interest and Sinking Fund and the commission may, in the resolution authorizing any series of bonds, provide for the appropriation from the proceeds thereof an amount which, together with any payment for accrued interest received in the sale of such bonds, shall be sufficient to pay interest coupons to mature on such series of bonds within the then current State of Texas fiscal year and to establish such reserves as shall be deemed appropriate by the commission. All net income

derived from entrance or gate fees to state park sites shall also be deposited to the Interest and Sinking Fund.

Transfer of funds out of treasury to pay principal and interest on bonds

Sec. 9-A. In the event the amount of moneys on hand in the Interest and Sinking Fund at the end of any fiscal year is insufficient to pay the interest becoming due and the principal maturing on the bonds during the ensuing fiscal year, the state treasurer upon certification by the director as of August 15 of each fiscal year shall transfer out of the first moneys coming into the treasury of the State of Texas, not otherwise appropriated by the Constitution, such amount as stipulated in the certification of the director as shall be required to pay principal and interest on such bonds during such fiscal year. After all bonds have been paid, the balance of the Interest and Sinking Fund shall be transferred to the "State Parks Fund" established by Chapter 168, Acts of the 42nd Legislature, 1931, General Laws, page 287, as amended by Chapter 431, Acts of the 47th Legislature, Regular Session, 1941[1]

Authority of Comptroller and Treasurer; mandamus

Sec. 9-B. The Comptroller of Public Accounts is hereby authorized and directed to make the transfers required under any provision of this Act. The Treasurer of the State of Texas is hereby authorized and directed to pay or cause to be paid principal and interest on bonds as they mature and come due. The performance of official actions by the Comptroller of Public Accounts and by the Treasurer of the State of Texas may be enforced through mandamus or other appropriate proceedings.

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[1]Article 6070a.

Investment of moneys in special funds

Sec. 9-C. Moneys in the Development Fund may be invested in obligations specified in Chapter 401, Acts of the 60th Legislature, and said Chapter 401 shall be applicable to such Fund and investments. Moneys in the Interest and Sinking Fund may be invested only in direct obligations of or obligations the principal and interest of which are guaranteed by the United States of America. Income from all such investments shall be deposited into the Interest and Sinking Fund.

Use of Development Fund; acquisition of property

Sec. 10. The Development Fund shall be used by the department for the purpose of acquiring state park sites from the United States or any governmental agency thereof, from any governmental agency of the State of Texas, or from any person, firm or corporation, by purchase, condemnation or otherwise, and for the purpose of improving, developing, beautifying, and equipping, said state park sites, and said department is hereby authorized to contract with any state or federal agency, or with any person, firm, or corporation for the purposes set out in this section. Property already devoted to a public use may be acquired in like manner; provided, that no real property belonging to the State or any political subdivision thereof, may be acquired without its consent. Condemnation authorized herein shall follow procedures as are now provided in the statutes of the State of Texas, including those provisions as provided for in Paragraph 3, Section 1 of Senate Bill No. 165, Chapter 112, 59th Legislature, Regular Session, 1965, and codified as Section 1 of Article 6081r of Vernon's Civil Statutes of Texas.

APPENDIX C

Article 6081r, Vernon's Texas Civil Statutes

Development of outdoor recreation resources

Parks and Wildlife Department as State Agency; cooperation with Federal Government; acquisition of land

Section 1. The Parks and Wildlife Department of the State of Texas is hereby designated as the State Agency to cooperate with the Federal Government in the administration of the provisions of any federal assistance programs for the planning, acquisition, operation, and development of the outdoor recreation resources of the state, including the acquisition of lands and waters and interests therein, and specifically to cooperate with the Federal Government in the administration of the provisions of the "Land and Water Conservation Fund Act of 1965" (Public Law 88-578)[1] effective January 1, 1965 and any amendments which may be added thereto from time to time, in the event no other State Agency is by law designated to cooperate with the Federal Government in the administration of the provisions of such Act or other Acts which may be hereafter enacted by the Congress.

The Parks and Wildlife Department is directed to enact and promulgate such rules and regulations as may be necessary to effect the cooperation as herein outlined and designated. The Parks and Wildlife Department is hereby authorized and directed to cooperate with the proper departments of the Federal Government and with all other departments of the state and local governments including as a part of a state plan water districts, river authorities, and special districts in outdoor recreation in the enforcement and ad-

[1] 16 U.S.C.A. §§ 460*l*-4 to 460*l*-11.

ministration of the provisions of the Federal Acts and any Amendments thereto and in compliance with the rules and regulations issued thereunder in the manner prescribed in this Act or as otherwise provided by law. It is the intent of the Legislature to add to the purposes, functions and duties of river authorities and water districts or other political subdivisions organized under Article III, Section 52, or Article XVI, Section 59, of the Constitution of Texas, and counties, to acquire lands for public recreation purposes, to construct thereon facilities for public use, to provide for the operation, maintenance and supervision of such public recreation areas, and to enter into agreements with other local, state or Federal Agencies for planning, construction, maintenance, and operation of such facilities, together with necessary access roads thereto, and to maintain adequate sanitary standards on the land and water areas as a part of and adjacent to such recreation areas.

The Parks and Wildlife Department, in order to accomplish the acquisition of lands under the programs outlined in this Act, may institute condemnation proceedings as are now provided in the Statutes of the State of Texas; however, if in the exercise of its power of eminent domain or police power, or any other power, it requires the relocation, raising, lowering, rerouting, or change in grade or alteration in the construction of any railroad, electric transmission, telegraph or telephone lines, conduits, poles, properties or facilities or pipelines, all such relocation, raising, lowering, rerouting, or changes in grade or alteration of construction shall be accomplished at the sole expense of the Parks and Wildlife Department of the State of Texas. The term "sole expense" shall mean the actual cost of such lowering, rerouting or change in grade or alteration of construction in providing comparable replacement

without enhancement of such facilities, after deducting therefrom the net salvage value derived from the old facility.

State-wide comprehensive plan

Sec. 2. The Parks and Wildlife Department is authorized and empowered to prepare, maintain, and keep up-to-date a state-wide comprehensive plan for the development of the outdoor recreation resources of the State of Texas; to develop, operate, and maintain outdoor areas and facilities of the state and to acquire land, waters, and interests in land and waters for such areas and facilities.

Participation in Federal program; contracts; records

Sec. 3. The Parks and Wildlife Department is authorized to apply to any appropriate agency or officer of the United States for participation in or the receipt of aid from any Federal program as now provided by law or as may hereafter be provided respecting outdoor recreation. The Parks and Wildlife Department is authorized to enter into contracts and agreements with the United States or any appropriate agency thereof for the purpose of planning, for acquisition of, and development of outdoor recreation resources of the state in conformity with the provisions of the "Land and Water Conservation Fund Act of 1965" and any Amendments thereto, and in conformity with any other Federal Act the purpose of which is the development of outdoor recreation resources of the state. The Department shall keep financial and other records relating to such programs and shall furnish to appropriate officials and agencies of the United States and of the State Government such reports and information as may be reasonably necessary to enable such officials

and agencies to carry out their responsibilities for the administration of such programs.

In order to obtain the benefits of any such programs, the Parks and Wildlife Department shall coordinate its activities with and represent the interests of all agencies and political subdivisions of the State of Texas including as a part of a state plan cities, counties, water districts, river authorities, and special districts in outdoor recreation having interests in the planning, development, acquisition, operation, and maintenance of outdoor recreation resources and facilities.

State funds; agreements on behalf of political subdivisions

Sec. 4. The Parks and Wildlife Department shall make no commitment or enter into any agreement pursuant to the authority under this Act until it has determined that sufficient funds are available to it for meeting the state's share, if any, of the cost of the project. It is the legislative intent that to such extent as may be necessary to assure the proper operation and maintenance of areas and facilities acquired or developed pursuant to any program participated in by the State of Texas under authority of this Act such areas and facilities shall be publicly maintained for outdoor recreation purposes.

The Parks and Wildlife Department may enter into and administer agreements with the United States or any appropriate agency thereof for plans, acquisition, operation, and development of projects involving participating Federal aid funds on behalf of any political subdivision or subdivisions of the State of Texas as set out in this Act provided that such political subdivision or subdivisions shall provide certification and give necessary assurance to the Department that they

have available sufficient funds to meet their share, if any, of the cost of the project and that the acquired or developed areas will be operated and maintained at the expense of such subdivision or subdivisions as set out in this Act for public outdoor recreation use.

Expenditure of Federal moneys; receipt and deposit of funds

Sec. 5. The Parks and Wildlife Department is authorized to accept and expend any Federal moneys allocated to the State of Texas for any projects or programs established for the purpose of carrying out the provisions of this Act and for administrative expenses and/or any other expenses incident to the administration of said projects or programs.

The Parks and Wildlife Department is authorized to receive and expend funds from the state, counties, and cities, and from any other source for the purpose of carrying out the provisions of this Act.

The Department shall deposit all such funds irrespective of source in the Special Fund hereinafter created in the State Treasury, and such funds shall be subject to withdrawal by the Parks and Wildlife Department and all such funds deposited in said Special Fund in the Treasury are hereby appropriated to the Parks and Wildlife Department.

State Land and Water Conservation Fund

Sec. 6. There shall be created in the State Treasury a Special Fund known as the "State Land and Water Conservation Fund" and all funds received from the Federal Government and/or from any other source for the purpose of paying the cost of planning, acquisition, operation, and development of outdoor recreation resources of the state and the administrative expenses incident to the projects or programs coming

within the scope of this Act shall be deposited in said Special Fund in the Treasury subject to withdrawals by the Parks and Wildlife Department.

Rules and Regulations

Sec. 7. The Parks and Wildlife Department is hereby authorized to promulgate rules and regulations governing the priority to be given projects submitted under the plan in pursuance to the provisions of this Act and within the limitations of the appropriation made for such purposes.

Personnel; costs of administration and operation of programs

Sec. 8. The Parks and Wildlife Department shall have the authority to employ such personnel as may be found necessary by the Executive Director and/or to make such arrangements as are necessary to efficiently carry out the purposes of this Act.

At such time as appropriations are made available for such purposes, the Parks and Wildlife Department is authorized to use such funds for the administrative costs and the operation of the programs established under and in pursuance to this Act or as it may hereafter be amended, including but not limited to the payment of salaries, travel expense, rent, bond premiums, postage, telephone and telegraph, freight, express, drayage, stationery, printed forms, office supplies, equipment, repairs, maintenance and miscellaneous and contingent expense.

In the Supreme Court of the United States

OCTOBER TERM, 1972

PEARCE JOHNSON, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioners brought an action in the United States District Court for the Western District of Texas, challenging the use of federal funds under the Land and Water Conservation Fund Act of 1965, 16 U.S.C. 460*l et seq.*, in the acquisition by Texas of Mustang Island off the coast of Texas for a state park. Petitioners allege that the acquisition of the island had been approved by the Secretary of the Interior in violation of the Land and Water Conservation Act and the regulations of the Bureau of Outdoor Recreation within the Department of the Interior.

Petitioner Johnson is the chairman of the Texas Parks and Wildlife Commission (which, with peti-

472-662—72

tioner Johnson dissenting, approved the acquisition) as well as the State Liaison Officer who, under the Bureau's regulations, was authorized to submit applications for federal funds. The other petitioners are citizens of Texas who have no direct interest in Mustang Island, but assert that the expenditure of state funds in the acquisition of the island will result in less funds being available for the purchase of other state parks in areas where they reside.

The district court ruled that petitioners have standing to maintain their suit, upheld their contention on the merits and enjoined the acquisition of the island with federal funds (Pet. App. D–1 to D–30). The court of appeals reversed, holding that petitioners lack standing (Pet. App. A–1 to A–10).

2. The decision of the court of appeals is correct, does not conflict with decisions of this Court or any other court of appeals and presents no question warranting further review. Neither petitioner Johnson nor the other petitioners have alleged personal injury sufficient to afford them standing under the standards recently developed in *Sierra Club* v. *Morton*, 405 U.S. 727, to challenge the federal approval of funds to acquire Mustang Island. Petitioner Johnson was simply outvoted on the Texas Parks and Wildlife Commission [1] and has not been deprived of any legally

[1] In contrast to *Coleman* v. *Miller*, 307 U.S. 433, there is no claim here that petitioner Johnson's vote in fact prevailed on the state Commission. And see *id.* at 464–465 (opinion of Frankfurther, J.).

protected rights;[2] the other petitioners have only a general interest in the expenditure of state funds for park acquisition and have failed to show either personal financial injury or a specific interest in Mustang Island itself sufficient to give them standing to contest the acquisition. See *Flast* v. *Cohen*, 392 U.S. 83, 102–103.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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[2] Petitioners assert that the decision below is in conflict with the decisions in *Nuesse* v. *Camp*, 385 F. 2d 694 (C.A.D.C.), and *Leuthold* v. *Camp*, 405 F. 2d 499 (C.A. 9), holding that state banking commissioners have standing to contest decisions of the United States Comptroller of the Currency with respect to the operations of national banks within their respective states. In those cases, the courts found that the complementary nature of state and national policies in the banking area gave the state officials, acting for the state, a sufficient interest to intervene in federal banking decisions. Here, far from contesting the federal action, the state had approved the acquisition of Mustang Island; a dissenting parks commissioner cannot in these circumstances claim to be asserting the interests of the state.

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MICHAEL RODAK, JR.

No. 71-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

PEARCE JOHNSON, ET AL
Petitioners,

v.

ROGERS C. B. MORTON, ET AL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS AND MEMORANDUM IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENTS' BRIEFS AND MEMORANDUM IN OPPOSITION

Pearce Johnson, Don Kennard, Ben Atwell and Peyton Walters ("Petitioners") hereby reply to: (1) "Memorandum for the United States in Opposition" ("U. S. Memorandum"); (2) "Brief for Mrs. Sam Wilson, Jr. in Opposition" ("Wilson Brief"); and (3) "Brief for Respondents in Opposition" ("State Brief").

I. REPLY TO U. S. MEMORANDUM

On pages 1-2 of the U. S. Memorandum, Respondents state that the Texas Parks and Wildlife Commission with Petitioner Johnson dissenting "approved the acquisition" of Mustang Island for a state park. On page 2, they state that "Petitioner Johnson was simply outvoted on the Texas Parks and Wildlife Commission." In footnote 2 on

Page 3, they again say that "the state had approved the acquisition of Mustang Island."

None of these statements can go unchallenged because they are simply untrue and not supported by the Record. In discussing the State Law Issues in this case, the trial court noted:

> "Because of the disposition made of the federal issues in this case, it is unnecessary to proceed to the various issues of state law presented by the complaint, and this Court expressly declines to rule upon them. However, in the opinion of this Court, the evidence at the hearing is sufficient to fully substantiate plaintiffs' contentions that the application for BOR funds submitted by Commissioners Jersig and Gilvin and the contracts of sale with Mrs. Wilson *were not official acts of the Parks and Wildlife Commission*." (Pet. App. D, pp. D27-D28. Emphasis added.)

II. REPLY TO WILSON BRIEF

In Wilson's Brief, the following statements are made which are not supported by *any* evidence in the Record herein:

1. "The Attorney General *has* formally ruled that the contract to purchase Mustang Island is a valid and binding obligation of the State of Texas." (Wilson's Brief, p. 7).
2. ". . . Johnson has no special interest in his *former* official capacities . . . Smith has replaced Petitioner Johnson as Chairman of the Parks & Wildlife Commission and as State Liaison Officer)." (Wilson's Brief, pp. 7-8)
3. "As Chairman of the Commission Johnson was simply outvoted by the other two Commissioners." (Wilson's Brief, p. 8)
4. "Petitioner Johnson was outvoted in this instance." (Wilson's Brief, p. 11).

In addition, Wilson's Brief attempts to convey the impression that the State Liaison Officer is merely an administrative convenience of the Secretary of the Interior and his agents in BOR. This contention was considered and rejected by the Trial Court because it conflicts with the express provisions of the BOR Manual and with the practices consistently followed by the BOR until the filing of this lawsuit. (Pet. App. D, pp. D25-D26).

III. REPLY TO STATE BRIEF

In its Statement of the case, the State Brief asserts as a fact that "The report that the Parks and Wildlife Department was short $1,000,000.00 in BOR funds to make the acquisitions in question was determined to be erroneous." (State Brief, p. 3). This statement is clearly contrary to the finding of the Trial Court below that "the evidence at the hearing is sufficient to fully substantiate plaintiffs' contentions . . . that implementation of this project would virtually eliminate state funding for acquisition and development of outdoor recreational resources through 1975." (Pet. App. D, p. D-28).

In footnote 2 on page 6, the State's Brief contends that Petitioner Johnson's designation is "meaningless", which is contrary to the findings of the Trial Court on this point, to the provisions of the BOR Manual, and to the practices of the BOR. (See, e.g., Pet. App. D, pp. D25-D26.).

IV. SUMMARY

Wilson's Brief, State's Brief and the U.S. Memorandum all rely in large part upon statements which are not supported by the Record or which are contrary to the evidence and findings of the Trial Court. Respondents thereby hope to paint a picture of a legitimate acquisition of a state park which causes no injury to anyone. Petitioners would point

out that the illegitimacy of the proposed acquisition has already been determined by the Trial Court. Therefore, insofar as the standing question is concerned, this is not a case involving competing legal uses of federal funds. Rather, it involves an illegal use of federal funds which injures all of the Petitioners who would benefit from any legal expenditure of those funds.

V. CONCLUSION

Since it is clear, even from the briefs and memorandum in opposition, that the issue involved in this case is of such importance that this Court should decide that issue and resolve the conflicts created by the opinion of the United States Court of Appeals for the Fifth Circuit, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Glen E. Clover
Counsel for Petitioners

September, 1972.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petitioners' Reply to Respondents' Briefs and Memorandum in Opposition have been served upon Respondents by mailing same on September 13, 1972, to their attorneys of record as provided by Rule 33(1) and (2) (a), Supreme Court Rules, at the following addresses:

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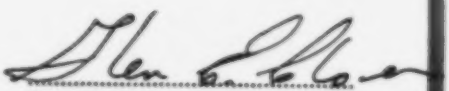

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1608

PEARCE JOHNSON, ET AL, PETITIONERS

v.

ROGERS C. B. MORTON, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR MRS. SAM WILSON, JR. IN OPPOSITION

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SUGGESTION OF MOOTNESS

Respondent, Mrs. Wilson, renews and urges the arguments contained in her Brief in Opposition. In addition, since Petitioners' filed their Petition for Certiorari in this case, the controversy has become moot. The Texas Parks & Wildlife Commission, by a 4-2 vote, *again* voted to purchase Respondent Mrs. Wilson's Mustang Island property. The State Liaison Officer, Chairman Jack Stone of The Parks and Wildlife Commission, renewed the request for federal matching funds under the Land and Water Conservation Fund Act of 1965 (16 U.S.C. §460e-4—460e-11). State and regional clearinghouse comments were long ago received by the Bureau of Outdoor Recreation. The Parks and Wildlife Department requested and received an appraisal of the property and an on-the-ground survey of the property. Assuming arguendo that there was ever any substance to Petitioners' allegations, certainly none presently exists.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be dismissed and denied as moot.

Respectfully submitted,
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Attorney for Respondent,
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